11-29-2010

Idaho Development, LLC v. Teton View Golf Estates, LLC Clerk's Record v. 4 Dckt. 37771

4 of 11

IN THE volume 4 of 7

LAW CLERK

SUPREME COURT

OF THE

STATE OF IDAHO

IDAHO DEVELOPMENT, LLC

Plaintiff and

Appellant

vs.

SEE AUGMENTATION RECORD

ROTHCHILD PROPERTIES, LLC,

Defendants and

Respondents

Appealed from the District Court of the Seventh *Judicial*

District of the State of Idaho, in and for Bonneville *County*

Hon. Jon J. Shindurling *, District Judge*

FILED - COPY

29

Supreme Court Court of Appeals

Attorney for Appellant

Attorney for Respondent

Filed this _____ day of _____, 20____,

Clerk

By _____ Deputy

37771 COPY

Douglas R. Hookland, ISB #6875
Scott ◆ Hookland LLP
9185 S.W. Burnham Street
P.O. Box 23414
Tigard, OR 97281-3414
(503) 620-4315 (Facsimile)
(503) 620-4540 (Telephone)
Attorney For Defendant and Third-Party Plaintiff HD Supply Waterworks, Ltd.

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

IDAHO DEVELOPMENT, LLC, a Utah limited liability company, Plaintiff, vs. TETON VIEW GOLF ESTATES, L.L.C., a Utah limited liability company; ROTHCHILD PROPERTIES, LLC, a Utah limited liability company; WESTERN EQUITY, LLC, a Utah limited liability company; AMERITITLE COMPANY; ZBS, LLC, an Idaho limited liability company; DEPATCO, INC., an Idaho Corporation; SCHIESS & ASSOCIATES, P.C., an Idaho Professional Service Corporation; HD SUPPLY WATERWORKS, LTD.; DOES 1-3, and ALL PERSONS IN POSSESSION OF REAL PROPERTY DESCRIBED HEREIN, Defendants.	Case No. CV-08-4395 ORDER DISMISSING DEFENDANT HD SUPPLY WATERWORKS, LTD.

HD SUPPLY WATERWORKS, LTD., a Florida limited partnership, doing business as HD SUPPLY WATERWORKS, formerly known as National Waterworks, Inc.,

Third-Party Plaintiff,

vs.

SANDRA A. MACARTHUR, Trustee of the Sandra A. MacArthur Family Trust; DANIEL STODDARD, individually and on behalf of his marital community; and JANE DOE STODDARD, on behalf of her marital community,

Third-Party Defendants.

ZBS, LLC, an Idaho liability company,

Counterclaimant/cross-claimant/third-party plaintiff,

vs.

IDAHO DEVELOPMENT, LLC, a Utah limited liability company,

Counter-defendant,

TETON VIEW GOLF ESTATES, LLC, a Utah limited liability company; AMERITITLE COMPANY; DEPATCO, INC., an Idaho Corporation; SCHIESS & ASSOCIATES, P.C., an Idaho Professional Services Corporation; HD SUPPLY WATERWORKS, LTD.;

Cross-defendants,

ALLIANCE TITLE & ESCROW CORP., an Idaho corporation, as and only as trustee, IDAHO TITLE & TRUST, INC., as and only as trustee, DOES 1-20;

Third-party defendants.

Pursuant to the stipulation for dismissal submitted herewith, and the court being otherwise fully advised, it is hereby

ORDERED as follows:

1. All claims asserted by or against defendant HD Supply Waterworks, Ltd., whether labeled as claims, counterclaims, cross-claims, third-party claims, or otherwise, are hereby dismissed with prejudice and without costs or attorney fees to any party; and

2. Defendant HD Supply Waterworks, Ltd. is hereby dismissed from this action with prejudice and without costs or attorney fees to any party.

DATED this 17th day of November, 2009.

Judge

SUBMITTED BY:
SCOTT ◆ HOOKLAND LLP

Douglas R. Hookland, ISB #6875
Of Attorneys For Defendant HD Supply Waterworks, Ltd.

MARK R. FULLER (ISB No. 2698)
FULLER & CARR
410 MEMORIAL DRIVE, SUITE 201
P.O. BOX 50935
IDAHO FALLS, ID 83405-0935
TELEPHONE: (208) 524-5400
FACSIMILE: (208) 524-7167

ATTORNEY FOR DEFENDANT - DEPATCO, INC.

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF BONNEVILLE

IDAHO DEVELOPMENT COMPANY, LLC., a Utah limited liability company,

Plaintiff,

v.

TETON VIEW GOLF ESTATES, LLC., a Utah limited liability company, ROTHCHILD PROPERTIES, LLC., a Utah limited liability, WESTERN EQUITY, LLC., a Utah limited liability company, AMERITITLE COMPANY, ZBS, LLC., an Idaho limited liability company, DEPATCO, INC., an Idaho corporation, SCHIESS & ASSOCIATES, PC., an Idaho Professional Service Corporation, HD SUPPLY WATERWORKS, LTD., DOES 1-3, and ALL PERSONS IN POSSESSION OF REAL PROPERTY DESCRIBED HEREIN,

Defendants.

Case No. CV-08-4395

ORDER ALLOWING DEFAULT

In the above-entitled cause, it appearing that the Defendant, Teton View Golf Estates, LLC., is not a person in the Military Service as defined by Section 101(1) of the Act of Congress approved October 17, 1940 or in any Act of Congress or of the State Legislature duly adopted and approved, and it further

appearing that the Defendant, Teton Golf Estates, LLC., is not an infant, and it appearing that Defendant, Teton View Golf Estates, LLC., has filed to appear by attorney as ordered by this Court on August 12, 2009,

IT IS THEREFORE ORDERED that default may be entered against the Defendant, Teton View Golf Estates, LLC.

DATED this 12 day of Dec., 2009.

Judge

MARK R. FULLER (ISB No. 2698)
FULLER & CARR
410 MEMORIAL DRIVE, SUITE 201
P.O. BOX 50935
IDAHO FALLS, ID 83405-0935
TELEPHONE: (208) 524-5400
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ATTORNEY FOR DEFENDANT - DEPATCO, INC.

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF BONNEVILLE

IDAHO DEVELOPMENT COMPANY, LLC., a Utah limited liability company,

Plaintiff,

v.

TETON VIEW GOLF ESTATES, LLC., a Utah limited liability company, ROTHCHILD PROPERTIES, LLC., a Utah limited liability, WESTERN EQUITY, LLC., a Utah limited liability company, AMERITITLE COMPANY, ZBS, LLC., an Idaho limited liability company, DEPATCO, INC., an Idaho corporation, SCHIESS & ASSOCIATES, PC., an Idaho Professional Service Corporation, HD SUPPLY WATERWORKS, LTD., DOES 1-3, and ALL PERSONS IN POSSESSION OF REAL PROPERTY DESCRIBED HEREIN,

Defendants.

Case No. CV-08-4395

ORDER GRANTING SUMMARY JUDGMENT AND DEFAULT JUDGMENT AGAINST TETON VIEW GOLF ESTATES, LLC.

The above-entitled matter came before the Court on August 10,

2009, pursuant to the Motion for Summary Judgment filed by Defendant, DePatco, Inc. No response was filed to the Motion for Summary Judgment by Teton View Golf Estates, LLC. The Defendant, Teton View Golf Estates, LLC., filed a Motion for Leave to Withdraw as Pro se Counsel, which was heard by the Court and granted pursuant to Order entered August 12, 2009. Such Order required Teton View Golf Estates, LLC., to procure an attorney licensed by the Idaho Bar Association within twenty (20) days and to notify the Court in writing of the appointment in accordance with IRCP 11. More than one hundred twenty (120) days have passed since the entry of the Order on August 12, 2009, and no attorney has appeared on behalf of Teton View Golf Estates, LLC.

An Affidavit of Default on behalf of DePatco, Inc., has been filed by its counsel, Mark R. Fuller, setting forth the accruing prejudgment interest to which DePatco is entitled, together with the principle amount sought pursuant to the above referenced Motion for Summary Judgment.

Pursuant to IRCP 11(b)(3) the failure to Teton View Golf Estates, LLC., to file and serve an additional written appearance in this action through a newly appointed attorney within the twenty (20) day period is sufficient grounds for entry of Judgment against such party, without further notice. Being fully advised in the premises, the Court enters the following Order:

1. DePatco, Inc., is hereby AWARDED Summary Judgment against Teton View Golf Estates, LLC., in the principle amount of

$584,638.36, together with accruing interest through December 9, 2009, in the amount of $144,719.15, for a total Judgment of principle and interest in the amount of $729,357.51.

2. Such Judgment shall accrue post-judgment interest pursuant to Idaho Code §28-22-105(2) at the rate of 5.625% per annum from the date hereof until paid.

3. That DePatco is GRANTED Default Judgment against the Defendant, Teton View Golf Estates, LLC., determining that DePatco has a valid and subsisting lien on the real property of Defendant, located in the City of Idaho Falls, Bonneville County, State of Idaho, more particularly described as follows:

> Teton View Estates, Division No. 1, Idaho Falls, Bonneville County, State of Idaho, pursuant to the plat recorded August 28, 2008, as Instrument No. 1310084

together with all improvements thereon constituting a part of said realty.

4. That the above stated lien be, and it is hereby, FORECLOSED;

5. That Defendant, Teton View Golf Estates, LLC., be and it is hereby, forever estopped from having or claiming to have any right, title, interest or lien in or to said real property, or any part thereof, superior to DePatco's said lien, prior to June 25, 2008, which is the date DePatco began providing work and materials to improve the real property.

6. By reason of the competing priority dates of the respective liens of the other Defendants, and the alleged security

interest of Plaintiff, the Court will not at this time enter an Order determining the priority of the respective claims of the parties, which shall be subject to further proceedings of the Court.

DATED this 14 day of December, 2009.

Jon Shindurling
District Judge

NOTICE OF ENTRY

I HEREBY CERTIFY that I mailed a conformed copy of the foregoing ORDER to the parties listed below on this 23 day of Dec., 2009.

Mark R. Fuller, Esq.
FULLER & CARR
P.O. Box 50935
Idaho Falls, ID 83405

Alan R. Harrison, Esq.
ALAN HARRISON LAW, PLLC
497 N. Capital Ave., Ste. 210
Idaho Falls, ID 83402

Jeffrey Brunson, Esq.
BEARD ST. CLAIR
2105 Coronado
Idaho Falls, ID 83404

Karl Decker, Esq.
HOLDEN KIDWELL HAHN & CRAPO
P.O. Box 50130
Idaho Falls, ID 83405

Kipp Manwaring, Esq.
JUST LAW OFFICE
P.O. Box 50271
Idaho Falls, ID 83405

Richard W. Mollerup, Esq.
MEULEMAN MOLLERUP
755 W. Front Street, Ste. 200
Boise, ID 83702

Ronald Longmore
CLERK

BY: Grace Walters
Deputy Clerk

MARK R. FULLER (ISB NO. 2698)
DANIEL R. BECK (ISB NO. 7237)
FULLER & CARR
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P.O. BOX 50935
IDAHO FALLS, ID 83405-0935
TELEPHONE: (208) 524-5400

ATTORNEYS FOR DEFENDANT - DEPATCO, INC.

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF BONNEVILLE

IDAHO DEVELOPMENT, LLC, A UTAH LIMITED LIABILITY COMPANY,

PLAINTIFF,

V.

TETON VIEW GOLF ESTATES, LLC, A UTAH LIMITED LIABILITY COMPANY; ROTHCHILD PROPERTIES, LLC, A UTAH LIMITED LIABILITY COMPANY; WESTERN EQUITY, LLC, A UTAH LIMITED LIABILITY COMPANY; AMERITITLE COMPANY; ZBS, LLC, AN IDAHO LIMITED LIABILITY COMPANY; DEPATCO, INC., AN IDAHO CORPORATION; SCHEISS & ASSOCIATES, P.C., AN IDAHO PROFESSIONAL SERVICE CORPORATION; HD SUPPLY WATERWORKS, LTD,; DOES 1-3, AND ALL PERSONS IN POSSESSION OF REAL PROPERTY DESCRIBED HEREIN,

DEFENDANTS.

CASE NO. CV-08-4395

AFFIDAVIT OF MARK R. FULLER

STATE OF IDAHO)
)ss.
County of Bonneville)

Mark R. Fuller, being first duly sworn upon his oath states and alleges as follows:

1. Affiant is a resident of Bonneville County, State of Idaho and executes this Affidavit upon his personal knowledge.

2. Affiant is over the age of 18 and is competent to testify.

3. Affiant is an attorney licensed in the State of Idaho and is counsel for the Defendant DePatco, Inc.

4. Attached hereto as Exhibit 'A' is a true and correct copy of the Joint Venture Agreement executed by Idaho Development and Rothchild Properties dated February 28, 2008.

5. Attached hereto as Exhibit 'B' is a true and correct copy of the Promissory Note and Deed of Trust executed by Teton View Golf Estates, LLC, in favor of Idaho Development dated February 29, 2008, and Amendment of Deed of Trust dated March 7, 2008.

6. Attached hereto as Exhibit 'C' are true and correct copy of excerpts from Idaho Development's Responses to Interrogatories and Request for Admissions

7. Attached as Exhibit 'D' is a true and correct copy of Articles of Organization of Teton View Golf Estates, LLC, also attached as Exhibit 'J' to Plaintiff's Complaint.

8. Further this Affiant sayeth naught.

DATED this 4th day of January, 2010.

Mark R. Fuller

MARK R. FULLER

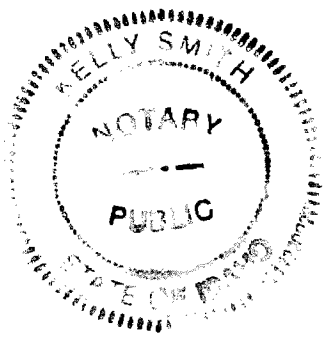
STATE OF IDAHO)
)ss.
County of Bonneville)

On this 4th day of January, 2010, before me, the undersigned notary public, in and for the State of Idaho, personally appeared, Mark R. Fuller, having first been duly sworn under oath, deposes and states that he has read the Affidavit set forth above, and verifies

that the facts as stated therein are true to the best of his knowledge and belief.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

Notary public for Idaho
Residing at Rigby
My commission expires: 06-28-2011



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and correct copy of the following described pleading or document on the attorneys listed below on this 4th day of January, 2010:

Document Served: AFFIDAVIT OF MARK R. FULLER

Persons Served:

Alan R. Harrison, Esq. ALAN HARRISON LAW, PLLC 497 N. Capital Ave., Ste. 210 Idaho Falls, ID 83402	✓ U.S. Mail ____ Facsimile ____ Hand Delivery
Jeffrey Brunson, Esq. BEARD ST. CLAIR 2105 Coronado Idaho Falls, ID 83404	✓ U.S. Mail ____ Facsimile ____ Hand Delivery
Karl Decker, Esq. HOLDEN KIDWELL HAHN & CRAPO P.O. Box 50130 Idaho Falls, ID 83405	✓ U.S. Mail ____ Facsimile ____ Hand Delivery
Rick Hajek (Ameritite) 1650 Elk Creek Idaho Falls, ID 83404	✓ U.S. Mail ____ Facsimile ____ Hand Delivery
Kipp L. Manwaring, Esq. JUST LAW OFFICE P.O. Box 50271 Idaho Falls, ID 83405	✓ U.S. Mail ____ Facsimile ____ Hand Delivery

Mark R. Fuller
Mark R. Fuller
FULLER & CARR

JOINT VENTURE AGREEMENT

Agreement made this 28 day of Feb, 2008 between Idaho Development, LLC, A Utah Limited Liability Company, located at 2192 Preston Street, Salt Lake City, UT 84106, and Rothchild Properties, LLC, a Utah Limited Liability Company located at 11105 Londonderry Drive, Sandy, UT 84092.

RECITALS

1) The parties desire to conduct a business enterprise together to be known as Teton View Golf Estates, LLC, a Utah Limited Liability Company.
2) Each party is willing to invest money or other good and valuable consideration, as hereinafter set forth, in order to finance and operate the conduct of the enterprise.
3) It is mutually agreed that the most desirable form of business for conducting the enterprise is a joint venture with an umbrella Limited Liability Company jointly owned by the parties.

For the reasons recited above, and in consideration of the mutual covenants contained in this agreement, the parties agree as follows:

I.

SCOPE AND DESCRIPTION

By this agreement, the parties create a joint venture to provide Teton View Golf Estates, LLC, investment capital and active participation as it relates to that certain development known as Teton View Estates, Idaho Falls, Bonneville County, State of Idaho . The joint venture shall be conducted in the name of Teton View Golf Estates, LLC, currently on file with the State of Utah, from a place of business located at 11105 Londonderry Drive, Sandy, UT 84092.

II.

CONTRIBUTIONS

Idaho Development, LLC is to initially contribute One Million One Hundred Thousand Dollars ($1,100,000.00) to the joint venture, with the understanding that upon the funding of the construction loan, Idaho Development shall be repaid the sum of Eight Hundred Thousand Dollars ($800,000), and shall subordinate the remaining sum

EXHIBIT A

with the exception of the commercial portion of the development,

of Five Hundred Thousand Dollars (~~$500,000~~) to the construction loan. It shall be repaid the balance of its investment under a lot release formula to be defined in the Second Deed of Trust and Trust Note securing the investment. Thereafter, Rothchild Properties is to contribute its time and skill in overseeing development and sale of building lots, and construction of homes to ensure its success. It is understood that Rothchild Properties will make no cash contribution to the joint venture, and that its total contribution shall consist of devoting all technology, know how, time and skill to the venture, making full use of its expertise gained through participation in similar enterprises in the past.

Contributions of money and/or property shall be made on or before February 29, 2008. Failure of either party to complete his respective contribution on a timely basis shall result in termination of this agreement and the enterprise organized herein.

III.

CONDUCT OF ENTERPRISE

Tony Versteeg shall be responsible for day to day management of the joint venture and shall devote his time to such management as is necessary and proper to ensure the success thereof.

However, Teton View Golf Estates, LLC shall have ultimate authority and the sole direction, management and the entire conduct of the joint venture. The enumeration of particular or specific powers in this agreement shall not be considered as in any way limiting or abridging the general power or discretion intended to be conferred on and reserved to the parties to authorize them to do any and all things proper, necessary, or expedient, in their discretion, to carry out the purposes of this agreement.

IV.

COMMENCEMENT OF VENTURE

This joint venture shall become operative on the 29th day of February, 2008.

V.

TITLE TO PROPERTY

All legal title to property acquired by the joint venture, whether real or personal, shall be taken in the name of Teton View Golf Estates, LLC, ~~with the express understanding that that certain 4.5 acre commercial parcel shall not be a part of this~~

agreement and shall vest solely in Rothchild Properties, LLC. The interest of each party in the subject property shall be proportionate to his or her share of the profits of the venture, as defined in the Articles of Organization of Teton Golf View Estates, LLC.

VI.

DIVISION OF PROFITS

The net profits earned by the joint venture, calculated at the end of each fiscal year, shall be divided among the parties as follows: Idaho Development, LLC shall receive thirty-three and one third percent (33.3%) and Rothchild Properties, LLC shall receive sixty-six and seven tenths percent (66.7%). The Managers shall be entitled to reasonable compensation, provided that full disclosure is made to all Members of the Joint Venture. The net profits will be calculated by first deducting all operating expenses from gross income of the joint venture.

VII.

SHARING OF PROCEEDS FROM SALE OF ASSETS

If, during the course of the joint venture, any of the assets of the joint venture are sold, subject to the lot release formula in any Trust Deed Note, the net proceeds of such sale or sales shall be distributed to the parties in proportion to their rightful share in profits.

VIII.

APPORTIONMENT OF LOSSES

The parties shall bear any net loss sustained by the venture in any fiscal year as follows:

Idaho Development, LLC shall bear thirty-three and one third percent (33.3%) of such loss, and Rothchild Properties, LLC shall bear sixty-six and seven tenths percent (66.7%) of such loss. Any assessment against a party for a loss shall be payable to the joint venture not later than ninety (90) days after the close of the fiscal year.

IX.

MAINTENANCE OF BUSINESS AND ACCOUNTING RECORDS

Full and accurate business and accounting records shall be maintained reflecting all transactions of the joint venture, and each party shall be responsible for the entry of a complete and accurate account of all his or her transactions in behalf of the venture. The records shall be maintained at the office of the joint venture, and be subject to inspection or examination by the parties at all reasonable times. The records shall be maintained using the cash accrual method of accounting, on the joint venture's fiscal year basis.

The fiscal year of the joint venture shall commence on January 1, 2008 and close on December 31st of each subsequent year of operation. All accounting based on fiscal year figures shall be completed within ninety (90) days after the close of the fiscal year.

X.

MAINTENANCE OF BANK ACCOUNTS

All funds advanced by the parties to this joint venture agreement or borrowed for the account of the joint venture and all progress in final payments for other revenue received as a result of the performance of this joint venture shall be deposited to the account of the joint venture in an account to be established at such bank or banks as the parties to this joint venture may agree upon. Checks may be drawn on such accounts only by the signature of both parties to this joint venture.

XI.

INSURANCE

The joint venture shall obtain insurance to cover the following items and types of losses: as provided through Teton View Golf Estates, LLC.

XII.

ASSIGNMENT AND TRANSFERS

Neither party shall assign or transfer his or her rights or duties in the joint venture without the express written consent of the other party. Any transfer or assignment made without the consent of the other party shall not relieve the transferor or assignor of his or her duties or obligations under this agreement.

XIV.

ARBITRATION OF DISPUTES

If, during the course of the venture, the parties are unable to agree on any matters with respect to which a decision must be made, or if, on termination, no satisfactory arrangement can be made for settlement of each party's interest in the venture, the dispute or disputes shall be subject to binding arbitration.

XIV.

TERM

The effective date of this agreement shall be the date first above written, and the commencement date of the joint venture contemplated herein shall be the date specified above. This agreement and the joint venture contemplated herein shall continue in effect for a period of fifteen (15) years from the date of commencement, or until dissolution as provided herein, whichever shall first occur.

XV.

TERMINATION OF AGREEMENT

Upon termination of this agreement for any cause whatsoever, the joint venture contemplated herein shall be wound up and dissolved in accordance with Utah Code Ann. 48-1-26 et seq. as applicable or by analogy.

IN WITNESS WHEREOF, THE PARTIES HAVE EXECUTED THIS AGREEMENT AT SALT LAKE CITY, STATE OF UTAH, ON THE DAY AND YEAR ABOVE WRITTED.

Melinda Boswell

Idaho Development, LLC by
Melinda Boswell, Manager

Rothchild Properties, LLC by
Tony Versteeg, Manager

JWS

PROMISSORY NOTE

$ 1,100,000.00 Idaho Falls, Idaho February 29, 2008

For Value received, the undersigned promise to pay to the order of **IDAHO DEVELOPMENT, LLC**, 2192 Preston Street, Salt Lake City, Utah, 84106 At such place as the holder may designate in writing, **THE PRINCIPAL SUM OF ONE MILLION ONE HUNDRED THOUSAND AND NO/100THS**

$1,100,000.00 together with interest beginning on February 29, 2008, at the rate of **Six** percent (6.0%) per annum, lawful money of the United States of America in installments as follows:

Monthly payments of Five Thousand Five Hundred Ninety five and 06/100ths Dollars ($6,595.06), beginning on February 29, 2008, and continuing on the same day of each and every month thereafter until paid in full on or before, but no later than 90 days from the date of this note, when the entire principal balance plus all accrued interest shall become due and payable if note is called due.

Note provides for payment to Idaho Development, LLC 15% net proceeds from each lot sale. In addition, in the event that the Note is not satisfied within the 90 day term at borrower's option, it may enlarge the Note with Idaho Development, LLC, to insure adequate funding for completion of the project. At a minimum, at borrower's option, Idaho Development agrees to leave the sum of $500,000.00 in the project and to then subordinate to any third party construction financing.

If default be made in the payment of any installment under this note, the entire principal sum and accrued interest shall at once become due and payable without notice at the option of the holder of this note. The failure of the holder of this note to enforce its rights upon default in any of the terms of this note shall not constitute a waiver of any such right in the event of a subsequent default. If suit is instituted to collect this note or any portion thereof, I agree to pay, in addition to the costs and disbursements as are allowed by law, such additional sums as the court may adjudge reasonable on attorney's fees in such suit. The makers, sureties, guarantors and endorsers hereof severally waive presentment for payment, protest, notice of protest and of non-payment of this notice.

The indebtedness evidenced by this Note is secured by a Deed of Trust of even date, and reference is made to the Deed of Trust for rights as to acceleration of the indebtedness evidenced by this note.

Due: May 28, 2008

EXHIBIT B

Teton View Golf Estates, LLC

By: Tony M. Versteeg

Instrument # 1291905
IDA[illegible] ALLS, BONNEVILLE, IDAHO
2008-02-29 04:06:00 PM No. of Pages: 2
Recorded for: ALLIANCE TITLE - IDAHO FA
RONALD LONGMORE Fee: 6.00
Ex-Officio Recorder Deputy SSolis
Index To: DEED OF TRUST
Electronically Recorded by Simplifile

Order No. 303081827LAC.

COMMERCIAL LOAN DEED OF TRUST

THIS DEED OF TRUST, Made this February 29, 2008 BETWEEN Teton View Golf Estates, LLC herein called **GRANTOR**, whose address is: 6371 N. 5th S., Idaho Falls, ID 83401, AND Alliance Title & Escrow Corp., herein called TRUSTEE, AND Idaho Development, LLC, herein called BENEFICIARY, whose address is 2192 Preston Street, Salt Lake City, UT 84106.

WITNESSETH: That Grantor does hereby irrevocably GRANT, BARGAIN, SELL AND CONVEY TO TRUSTEE IN TRUST WITH POWER OF SALE, that property in the county of Bonneville, State of Idaho, described as follows and containing not more than forty acres:

Beginning at a point that is South 0°27'09" East 25.00 feet along the section line from the Northeast Corner of Section 31, Township 3 North, Range 38, East of the Boise Meridian, County of Bonneville, State of Idaho, and running thence South 0°27'09" East 913.64 feet along the section line; thence South 89°32'51" West 1641.08 feet; thence South 39°14'56" East 502.03 feet to the 1/16th line of Section 31; thence South 89°00'06" West 104.71 feet to the centerline of the Idaho Canal; thence along the centerline of the Idaho Canal the following four courses: (1) North 36°27'12" West 633.43 feet; (2) North 15°03'08" West 239.69 feet; (3) North 1°10'58" East 246.69 feet; (4) North 2°53'42" East 297.79 feet to a point on the South Right-of-Way line of Tower Road; thence North 89°00'00" East 1839.63 feet along said road Right-of-Way to the POINT OF BEGINNING.

ALSO:

Beginning at a point that is South 00°16'08" East along the Section line 1066.05 feet from the Northeast Corner of Section 31, Township 3 North Range 38 East of the Boise Meridian, County of Bonneville, State of Idaho; running thence South 89°43'52" West 374.11 feet; thence North 00°49'18" West 127.48 feet; thence North 89°43'52" East 160.34 feet; thence South 00°16'08" East 100.00 feet; thence North 89°43'52" East 182.00 feet; thence North 00°16'08" West 100.00 feet; thence North 89°43'52" East 33.00 feet to the East line of said Section 31; thence South 00°16'08" East along the East line 127.47 feet to the POINT OF BEGINNING.

TOGETHER WITH the rents, issues and profits thereof, SUBJECT, HOWEVER, to the right, power and authority hereinafter given to and conferred upon Beneficiary to collect and apply such rents, issues and profits.
For the purpose of securing payment of the indebtedness evidenced by a promissory note, of even date herewith, executed by Grantor in the sum of $1,100,000.00, with final payment due: May 31, 2008, and to secure payment of all such further sums as may hereafter be loaned or advanced by the Beneficiary herein to the Grantor herein, or any or either of them, while record owner of present interest, for any purpose, and of any notes, drafts or other instruments representing such further loans, advances or expenditures together with interest on all such sums at the rate therein provided. Provided, however, that the making of such further loans, advances or expenditures shall be optional with the Beneficiary, and provided further, that it is the express intention of the parties to this Deed of Trust that it shall stand as continuing security until paid for all such advances together with interest thereon.
A. To protect the security of this Deed of Trust, Grantor agrees:

1. To keep said property in good condition and repair; not to remove or demolish any building thereon; to complete or restore promptly and in good and workmanlike manner any building which may be constructed, damaged or destroyed thereon and to pay when due all claims for labor performed and materials furnished therefor; to comply with all laws affecting said property or requiring any alterations or improvements to be made thereon; not to commit or permit waste thereof; not to commit, suffer or permit any act upon said property in violation of law; to cultivate, irrigate, fertilize, fumigate, prune and do all other acts which from the character or use of said property may be reasonably necessary, the specific enumerations herein not excluding the general.

2. To provide, maintain and deliver to Beneficiary fire insurance satisfactory to and with loss payable to Beneficiary. The amount collected under any fire or other insurance policy may be applied by Beneficiary upon any indebtedness secured hereby and in such order as Beneficiary may determine, or at option of Beneficiary the entire amount so collected or any part thereof may be released to Grantor. Such application or release shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice.

3. To appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee; and to pay all costs and expenses, including cost of evidence of title and attorney's fees in a reasonable sum, in any such action or proceeding in which Beneficiary or Trustee may appear.

4. To pay, at least ten days before delinquency all taxes and assessments affecting said property, when due, all encumbrances, charges and liens, with interest, on said property or any part thereof, which appear to be prior or superior hereto; all costs, fees and expenses of this Trust. In Addition to the payments due in accordance with the terms of the note hereby secured the Grantor shall at the option, and on demand of the Beneficiary, pay each month 1/12 of the estimated annual taxes, assessments, insurance premiums, maintenance and other charges upon the property, nevertheless in trust for Grantor's use and benefit and for the payment by Beneficiary of any such items when due. Grantor's failure so to pay shall constitute a default under this trust.

5. To pay immediately and without demand all sums expended by Beneficiary or Trustee pursuant to the provisions hereof, with interest from date of expenditure at the rate of interest specified in the above described promissory note.

6. Should Grantor fail to make any payment or to do any act as herein provided, then Beneficiary or Trustee, but without obligation so to do and without notice to or demand upon Grantor and without releasing Grantor from any obligations hereof, may; make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof, Beneficiary or Trustee being authorized to enter upon said property for such purposes; appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee; pay, purchase, contest or compromise any encumbrance, charge or lien which in the judgment of either appears to be prior or superior hereto; and, in exercising any such powers, or in enforcing this Deed of Trust by judicial foreclosure, pay necessary expenses, employ counsel and pay his reasonable fees.

Alliance Title & Escrow Corp
1070 Riverwalk Dr., Ste. 100
P.O. Box 50642
Idaho Falls, ID 83405-0642

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5. It is mutually agreed that:

1. Any award of damages in connection with any condemnation for public use of or injury to said property or any part thereof is hereby assigned and shall be paid to Beneficiary who may apply or release such moneys received by him in the same manner and with the same effect as above provided for disposition of proceeds of fire or other insurance.

2. By accepting payment of any sum secured hereby after its due date, Beneficiary does not waive his right either to require prompt payment when due of all other sums so secured or to declare default for failure so to pay.

3. At any time or from time to time, without liability therefor and without notice, upon written request of Beneficiary and presentation of this Deed and said note for endorsement, and without affecting the personal liability of any person for payment of the indebtedness secured hereby, Trustee may: Reconvey all or any part of said property; consent to the making of any map or plat thereof; join in granting any easement thereon; or join in any extension agreement or any agreement subordinating the lien or charge hereof.

4. Upon written request of Beneficiary stating that all sums secured hereby have been paid, and upon surrender of this Deed and said note to Trustee for cancellation and retention upon payment of its fees, Trustee shall reconvey, without warranty, the property then held hereunder. The Grantee in such reconveyance may be described as "the person or persons legally entitled thereto".

5. As additional security, Grantor hereby gives to and confers upon Beneficiary the right, power and authority, during the continuance of these Trusts, to collect rents, issues and profits of said property, reserving unto Grantor the right, prior to any default by Grantor in payment of any indebtedness secured hereby or in performance of any agreement hereunder, to collect and retain such rents, issues and profits as they become due and payable. Upon any such default, Beneficiary may at any time without notice, either in person, by agent, or by a receiver to be appointed by a court, and without regard to the adequacy of any security for the indebtedness hereby secured, enter upon and take possession of said property or any part thereof, in his own name sue for or otherwise collect such rents, issues and profits, including those past due and unpaid, and apply the same, less costs and expenses of operation and collection, including reasonable attorney's fees, upon any indebtedness secured hereby, and in such order as Beneficiary may determine. The entering upon and taking possession of said property, the collection of such rents, issues and profits and the application thereof as aforesaid, shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice.

6. Upon default by Grantor in payment of any indebtedness secured hereby or in performance of any agreement hereunder, all sums secured hereby shall immediately become due and payable at the option of the Beneficiary. In the event of default, Beneficiary shall execute or cause the Trustee to execute a written notice of such default and of his election to cause to be sold the herein described property to satisfy the obligations hereof, and shall cause such notice to be recorded in the office of the recorder of each county wherein said real property or some part thereof is situated.

Notice of sale having been given as then required by law, and not less than the time then required by law having elapsed, Trustee, without demand on Grantor, shall sell said property at the time and place fixed by it in said notice of sale, either as a whole or in separate parcels and in such order as it may determine, at public auction to the highest bidder for cash in lawful money of the United States, payable at time of sale. Trustee shall deliver to the purchaser its Deed conveying the property so sold, but without any covenant or warranty, express or implied. The recitals in such Deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including Grantor, Trustee, or Beneficiary, may purchase at such sale.

After deducting all costs, fees and expenses of Trustee and of this Trust, including cost of evidence of title and reasonable counsel fees in connection with sale, Trustee shall apply the proceeds of sale to payment of: all sums expended under the terms hereof, not then repaid, with accrued interest at the rate specified in the above described promissory note; all other sums then secured hereby; and the remainder, if any, to the person or persons legally entitled thereto.

7. This Deed applies to, inures to the benefit of, and binds all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns. The term Beneficiary shall mean the holder and owner of the note secured hereby, or, if the note has been pledged, the pledgee thereof. In this Deed, whenever the context so requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

8. Trustee is not obligated to notify any party hereto of pending sale under any other Deed of Trust or of any action or proceeding in which Grantor, Beneficiary or Trustee shall be a party unless brought by Trustee.

9. In the event of dissolution or resignation of the Trustee, the Beneficiary may substitute a trustee or trustees to execute the trust hereby created, and when any such substitution has been filed for record in the office of the Recorder of the county in which the property herein described is situated, it shall be conclusive evidence of the appointment of such trustee or trustees, and such new trustee or trustees shall succeed to all of the powers and duties of the Trustee or trustees named herein.

Request is hereby made that a copy of any Notice of Default and a copy of any Notice of Sale hereunder be mailed to the Grantor at his address hereinbefore set forth.

Teton View Golf Estates, LLC

By: Kelly M. Versteeg

State of Idaho)
) ss.
County of Bonneville)

On this 29th day of February, 2008, before me, a Notary Public in and for said state, personally appeared Tony M. Versteeg known or identified to me to be the Managing Member in the Limited Liability Company known as Teton View Golf Estates, LLC who executed the foregoing instrument, and acknowledged to me that he executed the same in said LLC name.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

MILLY F. GABETAS NOTARY PUBLIC STATE OF IDAHO

Notary Public for the State of Idaho
Residing at: Idaho Falls
Commission Expires: Residing in Idaho Falls, Idaho
Commission Expires 03-19-2010

1291905

AMT

AMENDMENT OF DEED OF TRUST

THIS AMENDMENT is made by and between Teton View Golf Estates, LLC, and Idaho Development, LLC hereinafter referred to as "BENEFICIARY",

WITNESSETH:

WHEREAS, the Grantor did make, execute and deliver to the Beneficiary a Note secured by that certain Deed of Trust in the amount of One Million, one hundred thousand and no/100 Dollars, ($1,100,000.00), recorded as Instrument No. 1291905, in the records of Bonneville County, Idaho, covering the premises described as follows:

Beginning at a point that is S 0°27'09" E 25.00 feet along the section line from the Northeast corner of Section 31, Township 3 North, Range 38, East of the Boise Meridian, Bonneville County, Idaho, and running thence S 0°27'09" E 913.64 feet along the Section line; thence S 89°32'51" W 1641.08 feet; thence S 39°14'56" E 502.03 feet to the 1/16th line of Section 31; thence S 89°00'06" W 104.71 feet to the centerline of the Idaho Canal; thence along the centerline of the Idaho Canal the following four courses: (1) N 36°27'12" W 633.43 feet; (2) N 15°03'08" W 239.69 feet; (3) N 1°10'58" E 246.69 feet; (4) N 2°53'42" E 297.79 feet to a point on the South Right-of-Way line of Tower Road; thence N. 89°00'00" E 1839.63 feet along said road Right-of-Way to the point of beginning.

ALSO:

Beginning at a point that is S 00°16'08" E along the section line 1066.05 feet from the Northeast corner of Section 31, Township 3 North, Range 38 East of the Boise Meridian, Bonneville County, Idaho; running thence S 89°43'52" W 374.11 feet; thence N 00°49'18" W 127.48 feet; thence N 89°43'52" E 160.34 feet; thence S 00°16'08" E 100.00 feet; thence N 89°43'52" E 182.00 feet; thence N 00°16'08" W 100.00 feet; thence N 89°43'52" E 33.00 feet to the East line of said Section 31; thence S 00°16'08" E along the East line 127.47 feet to the point of beginning.

And

WHEREAS, the parties desire to amend some of the terms and/or provisions of the Note and/or Deed of Trust, and

THEREFORE, in and for good and valuable considerations, the parties agree the terms and conditions of the Deed of Trust above described shall be and are hereby amended and modified as follows:

1. The amount of the Deed of Trust shall be amended to $850,000.00.

All terms and conditions of the Note and Deed of Trust shall remain the same and unchanged except as amended and/or modified herein.

Dated 3/7/08

GRANTOR:

Teton View Golf Estates, LLC

By _____
Tony Versteeg as Authorized Signatory for St Charles Group, Inc, Manager

By _____
Tony Versteeg as Manager of Western Equity, LLC, Manager

BENEFICIARY:

Idaho Development, LLC

By _____

Instrument # 1292697
IDAHO FALLS, BONNEVILLE, IDAHO
2008-03-10 12:51:00 PM No. of Pages: 2
Recorded for: AMERITITLE - IDAHO FALLS
RONALD LONGMORE Fee:6.00
Ex-Officio Recorder Deputy: SSoils
Index To: AMENDMENT
Electronically Recorded by Simplifile

This instrument is being filed as an accommodation only. It has not been examined as to its execution, insureability or effect on title.

1292697

STATE OF Utah)
) ss
COUNTY OF Salt Lake)

On this 7th day of March, 2008, before me, the undersigned, personally appeared Tony Versteeg as authorized signatory for St Charles Group, Inc and as Manager of Western Equity, LLC known or identified to me to be the Managing Member(s) of the limited liability company that executed the within instrument, and acknowledged to me that such company executed the same.

Notary Public
Commission Expiration Date: _____

Notary Public
BRADLEY KNIGHT
3779 South 8000 West
Magna, Utah 84044
My Commission Expires
December 22, 2009
State of Utah

STATE OF Utah)
) ss
COUNTY OF Salt Lake)

On this 7th day of March, 2008, before me, the undersigned, personally appeared Melinda Bissell - manager known or identified to me to be the Managing Member(s) of the limited liability company that executed the within instrument, and acknowledged to me that such company executed the same.

Notary Public
Commission Expiration Date: _____

Notary Public
BRADLEY KNIGHT
3779 South 8000 West
Magna, Utah 84044
My Commission Expires
December 22, 2009
State of Utah

1292697

Alan R. Harrison
ALAN R. HARRISON LAW, PLLC
497 N. Capital Ave, Suite 210
Idaho Falls, Idaho 83402
Telephone: (208) 552-1165
Fax: (208) 552-1176
(ISB#: 6589)

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

IDAHO DEVELOPMENT, LLC, a Utah limited liability company, Plaintiff, vs. TETON VIEW GOLF ESTATES, LLC, a Utah limited liability company; ROTHCHILD PROPERTIES, LLC, a Utah limited liability company; WESTERN EQUITY, LLC, a Utah limited liability company; AMERITITLE COMPANY; ZBS, LLC, an Idaho limited liability company; DEPATCO, INC., an Idaho Corporation; SCHIESS & ASSOCIATES, P.C., an Idaho Professional Service Corporation; HD SUPPLY WATERWORKS, LTD,; DOES 1-3, and ALL PERSONS IN POSSESSION OF REAL PROPERTY DESCRIBED HEREIN, Defendants.	Case No. CV-08-4395 **PLAINTIFF'S ANSWER TO DEFENDANT DEPATCO'S FIRST REQUEST FOR DISCOVERY**

COME NOW, Plaintiff, Idaho Development, LLC, answers Defendant DePatco's First Request for Discovery as follows:

EXHIBIT C

INTERROGATORIES

INTERROGATORY NO. 1: Please provide the following personal information concerning the person or persons answering these interrogatories:

a. Full name;

b. Present address;

c. Present position with, office in, ownership interest in, or relationship to Idaho Development, LLC.

ANSWER TO INTERROGATORY NO. 1: Melinda Boswell, 145 S. Crystal Lakes Dr. Unit #113, St. George, UT 84770. Melinda is the manager and 100% owner of Idaho Development, LLC.

David Clark, 145 S. Crystal Lakes Dr. Unit #113, St. George, UT 84770. David has no present position, office or ownership in Idaho Development, LLC.

INTERROGATORY NO. 2: Please list and identify any exhibits that you intend or expect to introduce into evidence at any hearings or trial of the above-entitled matter and state the name and address of the person presently having possession of the exhibits.

ANSWER TO INTERROGATORY NO. 2: Plaintiff reserves the right to use any of the following documents at trial, along with any other document submitted by Plaintiff to Defendant DePatco or any other document provided by another party in this case, or any further documents which may be discovered.

1) Copy of Promissory Note from Teton View to Idaho Development – Alan Harrison, 497 N. Capital Ave. Suite 210, Idaho Falls, ID 83402. Already provided as Exhibit A to Plaintiff's Amended Complaint.
2) Copy of Deed of Trust from Teton View to Idaho Development – Alan Harrison, 497 N. Capital Ave. Suite 210, Idaho Falls, ID 83402. Already provided as Exhibit B to Plaintiff's Amended Complaint.
3) Copy of Amended Deed of Trust from Teton View to Idaho Development – Alan Harrison, 497 N. Capital Ave. Suite 210, Idaho Falls, ID 83402. Already provided as Exhibit C to Plaintiff's Amended Complaint.
4) Copy of Partial Reconveyance - Alan Harrison, 497 N. Capital Ave. Suite 210, Idaho Falls, ID 83402. Already provided as Exhibit D to Plaintiff's Amended Complaint.
5) Copy of printout showing Idaho Development is a Utah Company. Attached to this Exhibit as Exhibit E.

6) Copy of Articles of Organization for Idaho Development, LLC. Attached to this Exhibit as Exhibit F.

7) Copy of current Articles of Organization for Idaho Development, LLC. Attached to this Exhibit as Exhibit G.

8) Copy of Promissory Note from Teton View to ZBS, LLC- Alan Harrison, 497 N. Capital Ave. Suite 210, Idaho Falls, ID 83402. Attached to this discovery request as Exhibit H.

9) Copy of Joint Venture Agreement between Idaho Development and Rothchild Properties - Alan Harrison, 497 N. Capital Ave. Suite 210, Idaho Falls, ID 83402. Attached to this discovery request as Exhibit I.

10) Copy of Articles of Organization of Teton View Golf Estates - Alan Harrison, 497 N. Capital Ave. Suite 210, Idaho Falls, ID 83402. Attached to this discovery as Exhibit J.

11) Copy of Warranty Deed from ZBS, LLC to Teton View Golf Estates - Alan Harrison, 497 N. Capital Ave. Suite 210, Idaho Falls, ID 83402. Attached to this discovery request as Exhibit K.

12) Copy of Deed of Trust from Teton View to ZBS, LLC - Alan Harrison, 497 N. Capital Ave. Suite 210, Idaho Falls, ID 83402. Attached to this discovery request as Exhibit L.

13) Copy of Request for Partial Reconveyance by Idaho Development - Alan Harrison, 497 N. Capital Ave. Suite 210, Idaho Falls, ID 83402. Attached to this discovery request as Exhibit M.

14) Copy of Warranty Deed from Teton View to Rothchild of commercial property - Alan Harrison, 497 N. Capital Ave. Suite 210, Idaho Falls, ID 83402. Attached to this discovery request as Exhibit N.

15) Copy of Deed of Partial Reconveyance by ZBS, LLC - Alan Harrison, 497 N. Capital Ave. Suite 210, Idaho Falls, ID 83402. Attached to this discovery request as Exhibit O.

16) Copy of Demand Letter to Teton View from Idaho Development - Alan Harrison, 497 N. Capital Ave. Suite 210, Idaho Falls, ID 83402. Attached to this discovery request as Exhibit P.

17) Copy of Quitclaim deed from Rothchild to Teton View of commercial property - Alan Harrison, 497 N. Capital Ave. Suite 210, Idaho Falls, ID 83402. Attached to this discovery request as Exhibit Q.

18) Copy of Deed of Trust to Idaho Development on commercial property - Alan Harrison, 497 N. Capital Ave. Suite 210, Idaho Falls, ID 83402. Attached to this discovery request as

Exhibit R.

19) Copy of Deed of Trust Note to Idaho Development on commercial property - Alan Harrison, 497 N. Capital Ave. Suite 210, Idaho Falls, ID 83402. Attached to this discovery request as Exhibit S.

INTERROGATORY NO. 3: Identify each and every fact witness you plan to call to testify at the trial in this action and provide a brief summary of the facts to which each such witness will testify.

ANSWER TO INTERROGATORY NO. 3:

1) Melinda Boswell: Ms. Boswell, acting as manager of Idaho Development, LLC, signed a joint venture agreement and operating agreement for Teton View with Lynn Spafford and Tony Versteeg. These were to be the only people in Teton View. Mr. Spafford and Mr. Versteeg were going to manage Teton View. Idaho Development gave $1,100,000.00 to Teton View for the purchase of development property in Idaho. Idaho Development would not have given this money to Teton View without a first position on the property. The money Idaho Development gave to Teton View was secured by a promissory note and deed of trust on the property for $1,100,000.00, which was recorded at the Bonneville County Recorder's Office on February 29, 2008 as Instrument No. 1291905. As the managers of Teton View, Mr. Spafford and Mr. Versteeg were responsible to get a construction loan on the property, pay Idaho Development $800,000.00 plus interest each month, before May 28, 2008. Idaho Development would then subordinate $300,000.00 of its promissory note to the construction loan. Idaho Development was intending to use the money it received in May to start up a business opportunity in southern Utah.

It was Idaho Development's understanding that Jim Zundell from ZBS, LLC, who was selling the property, agreed to subordinate $640,000.00, the remaining amount he was owed for the sale of the property, to Idaho Development's deed of trust for $1,100,000.00. Idaho Development was presented by Mr. Spafford and Mr. Versteeg with an Amendment to their deed of trust reducing the amount to $850,000.00. Idaho Development had not intended to reduce their first position of $1,100,000.00 until a construction loan came through, at which time they would subordinate $300,000.00 behind the construction loan. Idaho Development trusted Mr. Spafford and Mr. Versteeg and signed the Amended deed of trust, which was recorded in Bonneville County on March 10, 2008 as Instrument No. 1292697. Mr. Spafford and/or Mr. Versteeg presented various documents to Idaho

Development to show they were getting a loan, however no loan was obtained by May 28, 2008. Idaho Development contacted Mr. Spafford and Mr. Versteeg and agreed to extend the time to obtain the loan for a month. When a loan was not obtained, Idaho Development consulted legal counsel. A demand letter was sent to Mr. Spafford and Mr. Versteeg, who did not respond to Idaho Development's legal counsel. Idaho Development filed the present action to foreclose its deed of trust, amended deed of trust, and collect on the total amount owed under the promissory note. Lynn and Tony have still not been able to obtain a construction loan for the property.

Ms. Boswell would testify she did not enter into any agreements with DePatco to begin work before a construction loan was obtained. Ms. Boswell was told by Mr. Spafford and Mr. Versteeg that they were using DePatco because DePatco would do the first $500,000.00 worth of work and subordinate this amount to the construction loan. They would then be repaid this amount out of lot draws.

2) David Clark: Mr. Clark had previously worked with Mr. Spafford on other projects. He would be able to testify to all the circumstances and details surrounding Idaho Development's giving money to Teton View. His testimony would be substantially similar to the testimony of Ms. Boswell.

Mr. Clark would be able to testify he called DePatco on July of 2008. He talked with Greg Stoddard. He asked them if they were going to sign an agreement to subordinate $500,000.00 to the construction loan. Mr. Clark also informed them a construction loan had not been obtained by Teton View.

3) Lynn Spafford: It is anticipated Mr. Spafford will testify he agreed to have Teton View sign a promissory note and deed of trust, and was aware Mr. Versteeg signed both of these, in favor of Idaho Development for $1,100,000.00. It is anticipated Mr. Spafford will testify he was to pay Idaho Development $800,000.00 by May 28, 2008 and that this was not done. It is anticipated, Mr. Spafford will testify as manager of Teton View he has presented several loan proposals to Idaho Development, but has not obtained a construction loan as he agreed to do. It is anticipated Mr. Spafford will testify he and Mr. Versteeg are the ones who made contact with DePatco and made agreements with DePatco regarding work done on the property. It is anticipated that Mr. Spafford will testify he asked David Clark to look for money for the construction loan.

4) Tony Versteeg: It is anticipated Mr. Versteeg would be able to testify to all the

circumstances and details surrounding Idaho Development's giving money to Teton View. It is anticipated Mr. Versteeg's testimony would be substantially similar to the testimony of Lynn Spafford.

5) Jim Zundell: It is anticipated Mr. Zundell will testify he sold the property to Teton View and agreed to subordinate the remaining amount he was owed, $640,000.00, to Idaho Development.

6) Greg Stoddard: It is anticipated Mr. Stoddard would testify he agreed with Mr. Spafford and/or Mr. Versteeg to begin work on the property knowing Teton View had not yet obtained a construction loan. It is anticipated Mr. Stoddard will testify he began work on the property looking to be paid from the construction loan and/or that he would subordinate the first $500,000.00 to the construction loan and be paid this amount in lot releases. It is anticipated that Mr. Stoddard will say that he pulled the equipment off because they hit rock on the property.

INTERROGATORY NO. 4: Please identify each and every expert witness you plan to call to testify at the trial in this action. As to each witness, please state the subject matter on which the expert witness is expected to testify, the substance of the opinions to which the expert witness is expected to testify, state the underlying facts and data upon which the expert opinions are based, the qualifications of such expert witness relevant to such expert's testimony, and the hourly rate paid to such expert.

ANSWER TO INTERROGATORY NO. 4: Plaintiff has not identified any expert witness to testify at this time. If and when Plaintiff identifies an expert to call at trial, Plaintiff will promptly supplement this discovery request.

INTERROGATORY NO. 5: Please state the name, address and telephone number of every person known to you or your attorney who may have any knowledge of any fact pertinent to damages and/or liability in this case, and identify the knowledge possessed by such person.

ANSWER TO INTERROGATOR NO. 5:

1) Melinda Boswell, 145 S. Crystal Lakes Dr. Unit #113, St. George, UT 84770. 801-971-4921. Please see Answer to Interrogatory No. 3 for a brief summary of the facts to which she will testify.

2) David Clark, 145 S. Crystal Lakes Dr. Unit #113, St. George, UT 84770. 801-557-2034. Please see Answer to Interrogatory No. 3 for a brief summary of the facts to which he will testify.

3) Lynn Spafford, PO Box 711946, SLC, UT 84171. 801-916-9200. Please see Answer to Interrogatory No. 3 for a brief summary of the facts to which he will testify.
4) Tony Versteeg, 11105 Londonderry Dr.,Sandy, UT 84092. 801-661-4344. Please see Answer to Interrogatory No. 3 for a brief summary of the facts to which he will testify.
5) Jim Zundell, information is with ZBS, Inc. attorney, Karl Decker.
6) Greg Stoddard, information is with DePatco's attorney, Mark Fuller.

INTERROGATORY NO. 6: Please identify by case name, county, state and case number, all litigation of every kind and nature in which Idaho Development, LLC has been involved as a party in the ten (10) years prior to the submission of Answers to these Interrogatories.

ANSWER TO INTERROGATORY NO. 6: Idaho Development has never been a party to any other litigation.

INTERROGATORY NO. 7: Please identify and explain in detail, the nature of your ownership interest in Teton View Golf Estates, LLC, including but not limited to a description of the amount of your interest, when you acquired such interest, and the consideration you paid to acquire the interest in Teton View Golf Estates, LLC.

ANSWER TO INTERROGATORY NO. 7: Idaho Development is a 1/3rd owner of Teton View. Idaho Development indicates the Articles of Organization of Teton View and the Joint Venture Agreement speak for themselves with regard to Idaho Developments ownership interest in Teton View. Idaho Development maintains the money given to Teton View was a loan and in no way intended to

INTERROGATORY NO. 8: Please identify and explain all contracts that have been entered into between Idaho Development and Rothchild Properties, LLC which are related to this litigation.

ANSWER TO INTERROGATORY NO. 8: Idaho Development and Rothchild Properties have signed a joint venture agreement and articles of organization of Teton View Golf Estates.

INTERROGATORY NO. 9: Submitted herewith are DePatco's First Request for Admissions to Idaho Development. As to each Request not unconditionally admitted, please set forth in detail each fact upon which you rely in denying each such Request for Admission.

ANSWER TO INTERROGATORY NO. 9:

1) Plaintiff denied Request for Admission No. 3 for the reason that she obtained a 33% ownership interest in Teton View, however her 33% ownership interest was not purchased

with the $1,100,000.00. The $1,100,000.00 was secured by a deed of trust and promissory note. The promissory note indicates she was to be paid 6% interest on the money she gave to Teton View. The Note was due in 90 days and the Deed of Trust indicates it was to be paid back by May 28, 2008. It was only after Teton View obtained a construction loan that Plaintiff would then subordinate $300,000.00 to the construction loan and obtain payment of this amount in lot releases. Plaintiff would receive 1/3rd of any profits received by Teton View. Rothchild Properties received 66% ownership without putting any money in to Teton View. Plaintiff intended the money given to Teton View as a loan to be repaid. The full $1,100,000.00 did not go to purchase an ownership interest in Teton View. Plaintiff would not have given the money if she did not receive the deed of trust and promissory note.

2) Plaintiff denied Request for Admission No. 5 for the reason, Mr. Spafford had requested David Clark try and find a loan. Mr. Clark made efforts to try and find a construction loan for the project.

REQUESTS FOR ADMISSION

REQUEST FOR ADMISSION NO. 1: Please admit that attached hereto as Exhibit A is a true and correct copy of a Joint Venture Agreement entered into on February 28, 2008 between Idaho Development and Rothchild Properties, LLC.

ANSWER TO REQUEST FOR ADMISSION NO. 1: Admit, however a page is missing from Exhibit A. In addition, there is another document which is substantially the same as Exhibit A, which is also appears to be a joint venture agreement between Idaho Development and Rothchild Properties which is attached to this Answer as Exhibit I.

REQUEST FOR ADMISSION NO. 2: Please admit that Teton View Golf Estates, L.L.C. was organized and registered in Utah on or before February 26, 2008.

ANSWER TO REQUEST FOR ADMISSION NO. 2: Admit.

REQUEST FOR ADMISSION NO. 3: Please admit that pursuant to the Joint Venture Agreement dated February 28, 2008 between Idaho Development and Rothchild Properties, Idaho Development purchased an ownership interest in Teton View Golf Estates, LLC.

ANSWER TO REQUEST FOR ADMISSION NO. 3: Deny.

REQUEST FOR ADMISSION NO. 4: Please admit that the Deed of Trust, recorded February 29, 2008, as Instrument No. 1291905 that you are attempting to enforce in your Amended Complaint to Foreclose Deed of Trust and Other Actions dated January 12, 2009, is security for the

One Million One Hundred Thousand Dollars ($1,100,000) payment to Teton View Golf Estates, LLC set forth in the February 28, 2008 Joint Venture Agreement.

ANSWER TO REQUEST FOR ADMISSION NO. 4: Admit, subject to the further clarification for Idaho Development giving the $1,100,000 to Teton View as set forth in this discovery response and Answer to Interrogatory No. 9 paragraph 1.

REQUEST FOR ADMISSION NO. 5: Please admit that Idaho Development made no contributions to Teton View Golf Estates, LLC other than the One Million One Hundred Thousand Dollars ($1,100,000) set forth in the Joint Venture Agreement dated February 28, 2008.

ANSWER TO REQUEST FOR ADMISSION NO. 5: Deny.

DATED this 20th day of May, 2009.

Alan R. Harrison
Attorney for Plaintiff

NOTICE OF SERVICE

I certify that on this day I served a true and correct copy of the foregoing document in accordance with Rule 5(b) of the Idaho Rules of Civil Procedure on the following by the method of service indicated:

Lynn Spafford (Teton View)
PO Box 711946
SLC, UT 84171
( ) Mailing, postage pre-paid
(✓) Fax number 801-359-2554

Tony Versteeg (Western Equity & Rothchild)
11105 Londonderry Dr.
Sandy, UT 84092
( ) Mailing, postage pre-paid
(✓) Fax 801-816-3959

Mark R. Fuller (Schiess)
410 Memorial Drive, Suite 201
PO Box 50935
Idaho Falls, ID 83405-0935
( ) Mailing, postage pre-paid
(✓) Fax 208-524-7167
(✓) Courthouse Box

Douglas R. Hookland (HD Supply)
9185 S.W. Burnham Street
PO Box 23414
Tigard, Oregon 97281
( ) Mailing, postage pre-paid
(✓) Fax 503-620-4315

Rick Hajek (Ameritite)
1650 Elk Creek
Idaho Falls, ID 83404
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Date: 5-20-09

ARH
Alan R. Harrison

ARTICLES OF ORGANIZATION
of
TETON VIEW GOLF ESTATES, L.L.C.

St. Charles Group, Inc., the undersigned person, does hereby adopts the following Articles of Organization for the purpose of forming a Utah Limited Liability Company.

ARTICLE I
NAME

This organization shall be known as Teton View Golf Estates, LLC.

ARTICLE II
BUSINESS PURPOSE

The Company is organized for the purpose of holding, acquiring, and selling real property, shares of water, interests in development of property, to perform any and all lawful act pertaining to the management of any lawful business as well as to engage in and to do any lawful business for which a Limited Liability Company may be organized under the Utah Limited Liability Company Act.

ARTICLE III
TAXATION

The LC elects to be taxed as a partnership for purposes of State and Federal Taxation.

ARTICLE IV
CAPITAL ACCOUNT

The initial capital account will be divided between the members as indicated below. The addition of new members will equally dilute the capital account of any and all members herein. Such addition will occur by amendment and by their unanimous adoption of this document and any existing operating agreement.

ARTICLE V
REGISTERED AGENT

The Company shall continuously maintain an agent in the State of Utah for service of process. The name of the initial registered agent shall be Lynn C. Spafford who resides at 2858 E. Willow Creek Drive, Sandy, UT 84093.

ACCEPTANCE OF APPOINTMENT:

Lynn C. Spafford

EXHIBIT D

THE DIRECTOR OF THE DIVISION OF CORPORATIONS SHALL BE APPOINTED AGENT OF THE COMPANY FOR SERVICE OF PROCESS IF THE AGENT HAS RESIGNED, THE AGENT'S AUTHORITY HAS BEEN REVOKED, OR THE AGENT CANNOT BE FOUND OR SERVED WITH THE EXERCISE OF REASONABLE DILIGENCE.

ARTICLE VI
MEMBERS

The names and street addresses of Members who shall constitute the initial Members of the Company and their respective capital account ownership follows:

Rothchild Properties, LLC.	66.6% ownership	P.O. Box 711946 SLC, UT 84171
Idaho Development, LLC.	33.3 % ownership	1691 East 4620 South SLC, UT 84117

ARTICLE VII
MANAGEMENT

The Company elects to be Managed by its Manager. The Managers of the Company shall be Lynn C. Spafford, Trustee, Spafford Family Trust (P.O. Box 711946, Salt Lake City, UT 84171) and Western Equity, LLC, (11105 Londonderry Drive, Sandy, UT 84092). All decisions shall be unanimous.

ARTICLE VIII
COMPENSATION

The Managers shall be entitled to reasonable compensation in the such amount as may be determined by management.

ARTICLE IX
RECORDS

The Company shall keep at its designated office all company records, which shall include the following: A current list of the names and current business address of the organizer and manager; A copy of the stamped Articles of Organization; and Copies of all financial and other records of the Company for the then most recent three years last occurring.

ARTICLE X
CONTRIBUTION

No Member shall be obligated to make any contribution to the Company except as may be contained in a separate agreement or by way of assessment to meet the then current needs of the Company.

ARTICLE XI
DISSOLUTION

This Company shall be dissolved with the unanimous written consent of the Managers.

ARTICLE XII
ANNUAL REPORT

The Company shall file all annual reports required by Utah Law during the month of it's anniversary date of formation as required by Section 48-2c-203, Utah Code Annotated.

ARTICLE XIII
AMENDMENTS

The Articles of Organization shall be amended from time to time as required by Section 48-2c-408, Utah Code Annotated. As new members are obtained they shall sign an agreement adopting these Articles. Such additional signatures shall constitute an amendment hereof and shall be countersigned and approved within the Managers' sole discretion.

ARTICLE XIV
ARBITRATION

In the unlikely event of a dispute, any controversy or claim arising out of or relating to these Articles or the breach thereof shall be settled by binding arbitration in accordance with the Utah Arbitration Act, U.C.A. Sections 78-31a-1, et seq.

ARTICLE XV
SIGNATURES

All members of the LLC are prohibited from transferring, assigning or encumbering any portion of their capital account without the express written permission of the Managers herein.

Dated this ____ day of March, 2008

Lynn C. Spafford

Lynn C. Spafford, Trustee,
Spafford Family Trust, Manager

Western Equity, LLC, Manager

Rothchild Development, LLC, Member

Idaho Development,LLC,, Member

NOTARY PUBLIC

STATE OF UTAH }
}ss
COUNTY OF SALT LAKE }

On the _____ day of _____, 2008, Lynn C. Spafford did personally appear before me who being duly sworn by me did acknowledge his authority to sign personally and/or Spafford Family Trust, by his signature or did personally sign the same.

Notary Public

My Commission Expires:

MARK R. FULLER (ISB No. 2698)
DANIEL R. BECK (ISB No. 7237)
FULLER & CARR
410 MEMORIAL DRIVE, SUITE 201
P.O. BOX 50935
IDAHO FALLS, ID 83405-0935
TELEPHONE: (208) 524-5400

ATTORNEYS FOR DEFENDANT – DEPATCO, INC.

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF BONNEVILLE

IDAHO DEVELOPMENT, LLC, a Utah limited liability company,

Plaintiff,

v.

TETON VIEW GOLF ESTATES, LLC, a Utah limited liability company; ROTHCHILD PROPERTIES, LLC, a Utah limited liability company; AMERITITLE COMPANY; ZBS, LLC, an Idaho limited liability company; DEPATCO, INC., an Idaho Corporation; SCHEISS & ASSOCIATES, P.C., an Idaho Professional Service Corporation; HD SUPPLY WATERWORKS, LTD,; DOES 1-3, and ALL PERSONS IN POSSESSION OF REAL PROPERTY DESCRIBED HEREIN,

Defendants.

Case No. CV-08-4395

MOTION FOR PARTIAL SUMMARY JUDGMENT RE: PLAINTIFF'S SECURED CLAIM PRIORITY

HD SUPPLY WATERWORKS, LTD., a Florida limited partnership, doing business as HD SUPPLY WATERWORKS, formerly known as National Waterworks, Inc.,

Third-Party Plaintiff,

vs.

SANDRA A. MACARTHUR, Trustee of the Sandra A. MacArthur Family Trust; DANIEL STODDARD, individually and on behalf of his marital community; and BROOKE STODDARD, on behalf of her marital community,

Third-Party Defendants

COMES NOW the Defendant, DePatco, Inc., (hereafter "DePatco") by and through its counsel of record, Mark R. Fuller, pursuant to IRCP 56(c) and moves for Partial Summary Judgment seeking recharacterization or equitable subordination of Idaho Development's Deed of Trust claim against Teton View Golf Estates. As a matter of law, Idaho Development's claim should be recharacterized as capital contributions or subordinated to the claims of DePatco.

DePatco is entitled to Summary Judgment because the undisputed facts show: (1) a complete absence of capital in Teton View Golf Estates and (2) Idaho Development's obtaining an ownership interest in the LLC in exchange for the $1.1 million allegedly secured by the Deed of Trust. DePatco respectfully requests the Court to exercise its equitable power to recharacterize Idaho Development's Deed of Trust claim as capital contributions or to subordinate such claim to DePatco's materialman's lien.

FACTS

On February 28, 2008, Idaho Development and Rothchild Properties, entered into a Joint Venture Agreement to "conduct a business enterprise together to be known as Teton View Golf Estates, LLC, a Utah Limited Liability Company." *See* Joint Venture Agreement dated February 28, 2008, pg. 1, attached as Exhibit 'A' to the Affidavit of Mark R. Fuller submitted herewith. Section 2 of the Joint Venture Agreement provides: "Idaho Development, LLC is to initially contribute One Million One Hundred Thousand Dollars ($1,100,000.00) to the joint venture, with the understanding that upon the funding of the construction loan, Idaho Development shall be repaid the sum of Eight Hundred Thousand Dollars ($800,000), and shall subordinate the remaining sum...to the construction loan." *Id.* at pg. 1-2. The remaining $300,000 was to be repaid "under a lot release formula...." *Id.* at pg. 2. The Agreement provides that "Rothchild Properties is to contribute its time and skill in overseeing development and sale of building lots, and construction of homes to ensure its success. It is understood that Rothchild Properties will make **no cash contribution** to the joint venture, and that its total contribution shall consist of devoting all technology, know how, time and skill to the venture, making full use of its expertise gained through participation in similar enterprises in the past." *Id.* at pg. 2 (emphasis added). Rothchild Properties put in no capital contribution, only services, and Idaho Development invested no capital, only advanced a loan of $1.1 million. Despite neither party putting **any** capital at risk, profits were to be divided between Idaho Development and Rothchild Properties at 33.3% and 66.7%, respectively. *Id.* at pg. 3.

On February 29, 2008, one day after Idaho Development entered into the Joint Venture Agreement, Teton View Golf Estates executed a Promissory Note secured by a

Deed of Trust in favor of Idaho Development. *See* Promissory Note and Deed of Trust, dated February 29, 2008, attached as Exhibit 'B' to the Affidavit of Mark R. Fuller. The Deed of Trust eliminated any equity in Teton View. Teton View Golf Estates treated the full $1,100,000.00 loan advanced by Idaho Development under the "Contributions" section of the Joint Venture Agreement as a loan to be repaid in full within 90 days. The Promissory Note states that if "the Note is not satisfied within the 90 day term at [Teton View's] option, it may enlarge the Note with Idaho Development, LLC, to insure adequate funding for completion of the project." *Id.* But, "[a]t a minimum, at [Teton View's] option, Idaho Development agrees to leave the sum of $500,000.00 in the project and to then **subordinate to any third party construction financing**." *Id.* (Emphasis added). However, in this litigation, Idaho Development asserts it is owed $1,025,000 plus unpaid interest (see Amended Complaint, Para. 23), and is seeking to recover the remaining balance and leave nothing in the business to insure adequate funding or to repay third party construction financing. *See* Amended Complaint, Para. 39. Idaho Development refuses to recognize its obligation to subordinate its claim to the construction financing provided by DePatco's extension of credit under its subcontract. On or about March 20, 2008, Idaho Development recorded an Amendment of Deed of Trust in the amount of $850,000 as Bonneville County Instrument No. 1292697, a copy of which is attached as Exhibit 'C' to Plaintiff's Amended Complaint and as part of Exhibit 'B' to the Affidavit of Mark R. Fuller.

According to Idaho Development's Responses to Interrogatories and Requests for Admission, Idaho Development's interest in Teton View Golf Estates was not purchased pursuant to the Joint Venture Agreement or for the sum of $1.1 million. "The full

$1,100,000.00 did not go to purchase an ownership interest in Teton View." *See* Plaintiff's Response to Interrogatory No. 9 and Request for Admission No. 3, attached as Exhibit 'C' to the Affidavit of Mark R. Fuller. Idaho Development further asserts that "Rothchild Properties received 66% ownership without putting any money in to Teton View." *Id.* No capital was ever put at risk in Teton View Golf Estates by either Idaho Development or Rothchild Properties. Article X of the Articles of Organization of Teton View Golf Estates, LLC provides that "no member shall be obligated to make any contribution to the company except as may be contained in a separate agreement or by way of assessment to meet the then current needs of the company." *See* Articles attached as Exhibit 'D' to the Affidavit of Mark R. Fuller. No assessment has been made and the Joint Venture Agreement is the only separate agreement which exists.

DePatco is a creditor of Teton View Golf Estates, LLC, secured by a lien on the property owned by Teton View Golf Estates, which is the subject of Idaho Development's Amended Complaint. DePatco's claim has been established by the Court's Order Granting Summary Judgment entered December 23, 2009, in the amount of $729,357.51, with post-judgment interest accruing at the rate of 5.625% per annum. *See* Order Granting Summary Judgment and Default Judgment Against Teton View Golf Estates, LLC., entered December 23, 2009. As a creditor, DePatco is entitled to a determination of the priority of all Deed of Trust claims asserted by Idaho Development in any amount.

STANDARD ON MOTION FOR SUMMARY JUDGMENT

This Court's standard in considering DePatco's Partial Motion for Summary Judgment was addressed in *G & M Farms v. Funck Irr. Co.*, 119 Id. 514, 808 P.2d 851 (1991):

> It is well established that "[A] motion for summary judgment shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." IRCP 56(c); *Olson v. Freeman*, 117 Idaho 706, 791 P.2d 1285 (1990); *Rawson v. United Steelworkers of Am.*, 111 Idaho 630, 726 P.2d 742 (1986); *Boise Car & Truck v. Waco*, 108 Idaho 780, 702 P.2d 818 (1985); *Schaefer v. Elswood Trailer Sales*, 95 Idaho 654, 516 P.2d 1168 (1973). Upon a motion for summary judgment, all controverted facts are liberally construed in favor of the non-moving party. *Tusch Enters. v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987); *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238 (1986); *Kline v. Clinton*, 103 Idaho 116, 645 P.2d 350 (1982). Likewise, all reasonable inferences which can be made from the record shall be made in favor of the party resisting the motion. *Tusch Enters. v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987); *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238 (1986); *Meridian Bowling Lanes, Inc. v. Meridian Athlete Ass'n, Inc.*, 105 Idaho 509, 670 P.2d 1294 (1983); *Anderson v. Ethington*, 103 Idaho 658, 651 P.2d 923 (1982); *Kline v. Clinton*, 103 Idaho 116, 645 P.2d 350 (1982). The burden at all times is upon the moving party to prove the absence of a genuine issue of material fact. *Petricevich v. Salmon River Canal Company*, 92 Idaho 865, 452 P.2d 362 (1969). However, the plaintiff's case must be anchored in something more than speculation and a mere scintilla of evidence is not enough to create a genuine issue. *Id.* See also *Nelson v. Steer*, 118 Idaho 409, 797 P.2d 117 (1990). If the record contains conflicting inferences or reasonable minds might reach different conclusions, a summary judgment must be denied. *Kline v. Clinton*, 103 Idaho 116, 645 P.2d 350 (1982); *Farmer's Ins. Co. of Idaho v. Brown*, 97 Idaho 380, 544 P.2d 1150 (1976). All doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom, and if reasonable people might reach different conclusions. *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238 (1986); *Ashby v. Hubbard*, 100 Idaho 67, 593 P.2d 402 (1979).

119 Id. at 516-7. If any genuine issue of material fact remains, after all reasonable inferences have been made in favor of the non-moving party, the Motion for Summary Judgment must be denied.

"When an action will be tried before the court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment but rather the trial judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts." *Loomis v. City of Hailey,* 119 Idaho 434,

437, 807 P.2d 1272 (1991). This matter is set for a court trial in June, 2010.

ARGUMENT

Idaho Development's alleged loan advanced to Teton View Golf Estates should either be recharacterized as capital contributions or should be equitably subordinated to DePatco's materialman's lien. The Tenth Circuit distinguishes recharacterization from equitable subordination. In *Sender v. Bronze Group, Ltd.,* the Tenth Circuit ruled that "[w]hen a putative loan to a corporation is recharacterized, the courts effectively ignore the label attached to the transaction at issue and instead recognize its true substance." 380 F.3d 1292, 1297 (10th Cir. 2004). However, equitable subordination "looks not to the substance of the transaction but to the behavior of the parties involved." *Id.* Under equitable subordination, "[t]he funds in question are still considered outstanding corporate debt, but the courts seek to remedy some inequity or unfairness perpetrated against...other creditors or investors by postponing...repayment until others' claims have been satisfied." *Id.* The Tenth Circuit analyzed recharacterization and equitable subordination as follows:

> Recharacterization cases turn on whether a debt actually exists, not on whether the claim should be equitably subordinated. In a recharacterization analysis, if the court determines that the advance of money is equity and not debt, the claim is recharacterized and the *effect* is subordination of the claim as a proprietary interest because the corporation repays capital contributions only after satisfying all other obligations of the corporation. In an equitable subordination analysis, the court is reviewing whether a legitimate creditor engaged in inequitable conduct, in which case the *remedy* is subordination of the creditor's claim to that of another creditor *only to the extent necessary* to offset injury or damage suffered by the creditor in whose favor the equitable doctrine may be effective.

Id. (Emphasis in original); citing *Beyer Corp. v. MascoTech, Inc.,* 269 F.3d 726, 748-49

(6th Cir. 2001).

1. Idaho Developments' Alleged Loan Should be Recharacterized as Capital Contributions.

According to the Idaho Supreme Court, "[t]he question of whether or not the sole or dominant stockholder of a corporation...may also become a creditor of the corporation by 'loaning' money to it has not previously been decided in Idaho." *Weyerhaeuser Company v. Clark's Material Supply Co.,* 90 Idaho 455, 460, 413 P.2d 180 (1966). The *Weyerhaeuser* Court identified two theories found in other jurisdictions. The first (recharacterization) is that "any investment by [a shareholder] are to further his own enterprise and are, therefore, capital contributions rather than loans, [and those jurisdictions] have not permitted such an 'owner' to become a creditor of his corporation to the detriment of other creditors when he advances funds to it." *Id.* The alternative theory (equitable subordination) "states that a dominant shareholder *under proper circumstances* can become a creditor of the corporation on equal terms with other creditors." *Id.* (emphasis in original). Unfortunately, the *Weyerhaeuser* Court did not decide which alternative was preferable or applicable in Idaho, concluding that the stockholder in that action was not a creditor under either scenario. *Id.* at 461. In the ruling, the court held that "[e]ven those authorities which permit a dominant shareholder to become a creditor of his corporation state that the transaction will be 'carefully scrutinized' to achieve the ends of justice and fairness." *Id.* at 461. Careful scrutiny includes finding that "the dealings must be in good faith, for the benefit of the corporation in an honest effort to carry on its business, without injury to the rights of other existing or **potential** creditors, treated as a loan by the parties involved, and contain no elements of fraud or misrepresentation." *Id* at 461

(emphasis added).

In 1980, the Supreme Court of Rhode Island was faced with a similar issue and referred to the *Weyerhaeuser* opinion in its analysis. *See Richard Tanzi et al. v. Fiberglass Swimming Pools, Inc.*, 414 A.2d 484 (1980). In *Tanzi* the court ruled that "[e]ven though a shareholder loan is not per se invalid, obviously the transaction is subject to strict judicial scrutiny." *Id.* at 488 (citations omitted). The Rhode Island Supreme Court made a clear determination that "persons making capital contributions are not corporate creditors." *Id.* at 489. The question faced by the Rhode Island Supreme Court was when should funding from a shareholder be considered a capital contribution and when should it be treated as a loan. The Rhode Island Court looked to other jurisdictions, including Idaho, for guidance and eventually followed a decision issued by the Supreme Court of Wisconsin. The following is Rhode Island's analysis of the Wisconsin decision:

> In *In re Mader's Store for Men,* 77 Wis. 2d 578, 254 N.W. 2d 171 (1977), the court collected and analyzed cases in which advances to a corporation were subordinated on the capital contribution theory and extracted the following relevant factors: (1) was the claimant in a position to control corporate affairs 'at least to the extent of determining the form of the transaction...'; (2) were the advances intended to be repaid in the ordinary course of the corporation's business; and (3) was the paid-in stated capital 'unreasonably small in view of the nature and size of the business in which the corporation was engaged.' *Id.* at 604-05, 254 N.W. 2d at 186. In our view, the *Mader* court correctly indicated that a breach of fiduciary duties was not a prerequisite to treating shareholder advances as capital contributions. Although it reached a contrary result, we would agree with the *Mader* court: **'Inequity enough to justify subordination exists when it is shown that a claim which is in reality a proprietary interest is seeking to compete on an equal basis with true creditors' claims.'** *Id.* at 605-06, 254 N.W.2d at 187.

Tanzi, 414 at 489-90 (emphasis added). The Rhode Island Supreme Court upheld the trial

court's opinion by stating that "[t]he *Mader* proposal that subordination...is mandated whenever the facts of the case indicate a proprietary interest rather than a debt echoes the reasoning of the trial justice...." *Id.* at 490. "The record reveals the following remarks by the trial justice: 'There is something wrong about this whole transaction. It has an aura about it. It is suspect. It seems clear to me from the evidence, that [the shareholder] operated this corporation essentially as an individual proprietorship.'" *Id.* at 490.

The Rhode Island Supreme Court went further, stating "that the reasoning in the bankruptcy cases may also be instructive in the present controversy." *Id.* at 490. Citing Cohen, *Shareholder Advances: Capital or Loans?,* 52 Am. Bankr. L.J. 274 (1978), the Rhode Island Supreme Court found that:

> In the bankruptcy context, the following criteria have been considered in determining the treatment of the disputed advancements: the adequacy of capital contribution, the ratio of shareholder loans to capital, the amount of shareholder control, the availability of similar loans from outside lenders, and certain relevant questions, such as, whether the ultimate financial failure was caused by under-capitalization, whether the note included repayment provisions and a fixed maturity date, whether a note or debt document was executed, whether proceeds were used to acquire capital assets, and how the debt was treated in the corporate records.

Tanzi, 414 at 490.

The Rhode Island Court found that "the initial risk capital of $3000 was inadequate to sustain corporate sales in excess of $200,000." *Id.* at 490. Further, "the transaction itself bore very few earmarks of an arm's length bargain...the proceeds, in reality, were used to acquire capital assets necessary for corporate expansion...[and] the belated execution of the promissory note strongly suggests that it was an attempt in form rather than in substance to protect the family investment" *Id.* at 490-91.

In 1988, North Dakota was also faced with a similar issue. *See Hanewald & Sons, Inc. et al. v. Bryan's Inc. et al.,* 429 N.W. 2d 414 (1988). The North Dakota Supreme Court noted that "[o]rganizing a corporation to avoid personal liability is legitimate. Indeed, it is one of the primary advantages of doing business in the corporate form. However, the limited personal liability of shareholders does not come free...It is the shareholders' initial capital investments which protects their personal assets from further liability in the corporate enterprise." *Id.* at 415-16 (citations omitted). As such "shareholders should in good faith put at the risk of the business unencumbered capital reasonably adequate for its prospective liabilities...[and] [p]roper capitalization might be envisioned as the principal prerequisite for the insulation of limited liability." *Id.* at 416 (citations omitted). In a footnote, the North Dakota court noted:

> There are some circumstances in which a shareholder's loan to the corporation may be treated as a capital contribution. In bankruptcy proceedings, for example, a shareholder's loans to his corporation can be treated as capital contributions when a corporation is deemed undercapitalized. However, the result in this class of cases is an equitable subordination of the shareholder's claim to the claims of other creditors, which is consistent in principle with the result we reach today.

Id. at 417, footnote 3.

According to the Tenth Circuit there are three factors to consider when determining if a loan should be recharacterized as equity contribution: "(1) the initial operating capital of [the entity], (2) the length of time the business was in operation at the time of the loan, and (3) whether the parties treated the transaction as a loan or as a capital investment." 380 F.3d at 1298. Looking at all three factors it is clear that Idaho Development's contributions should be treated as equity. If the contributions are treated as a loan then there was no initial operating capital for the operation of Teton View Golf Estates. Idaho Development's

promissory note was issued the day following the creation of Teton View Golf Estates, establishing that the advancement should be considered an initial capital investment. Further, the actions of Teton View Golf Estates and Idaho Development establish that they considered the funds as capital contributions. The funds have not been repaid, the terms of the funding were a part of the documents creating the entity, and the terms are more similar to capital contributions than debt due to the lack of a specific repayment deadline, no provisions for interest payments and the receipt of a 33.3% ownership interest in the LLC in exchange for the advancements. *See* Articles of Organization, Article VI, attached as Exhibit 'D' to the Affidavit of Mark R. Fuller.

2. Idaho Development's Interests Should be Equitably Subordinated to DePatco's

The Tenth Circuit found "three requirements that must be met for a court to exercise its equitable subordination power: (1) 'inequitable conduct' on the part of the claimant sought to be subordinated; (2) injury to the other creditors...or unfair advantage for the claimant resulting from the claimant's conduct; and (3) consistency with the provisions of the Bankruptcy Code. 380 F.3d at 1300, citing *Benjamin v. Diamond,* 563 F.2d 692, 699-700 (5th Cir. 1977). In 2002, the Alaska Supreme Court "recognized that the doctrine of equitable subordination, whereby the court may 'undo or offset any inequity in the claim position of a creditor that would produce injustice or unfairness to other creditors in terms of bankruptcy results,' can exist outside of the standard bankruptcy context." *Nerox Power Sys. V. M-B Contr. Co.,* 54 P.3d 791, 794-95 (2002).

One argument made by a defendant in *Nerox Power* was that only a portion of the debt was satisfied by the ownership interests in the corporation. *See generally Id.* at 796. However, the Alaska Supreme Court noted that the trial judge "could have effected the

subordination of [the] interest in the deed of trust independently of whether or not she believed that [the] debt had been satisfied by the issuance of stock." *Id.* at 796. A position as an insider "supports a finding of a fraudulent conveyance...sufficient to support equitable subordination of the deed of trust." *Id.* at 796. "Federal courts have recognized three types of misconduct that constitute 'inequitable conduct': (1) fraud, illegality, or **breach of fiduciary duties**; (2) **undercapitalization**; and (3) claimant's use of the debtor as a 'mere instrumentality' or alter ego." *Id.* at 796 (emphasis added). The Alaska court affirmed the trial court because two of the three types of misconduct existed and held that the conclusions were not clearly erroneous. *Id.* at 796.

In the *Nerox* case, the trial court "found that those named as beneficiaries had already had their debts satisfied by receiving preferred shares for their capital contributions. As such, [the trial court] determined that the interests of these beneficiaries in the deed of trust should be equitably subordinated to the claims of other creditors." *Id.* at 799. "As such, [the beneficiaries] would be investors and not creditors, which would prevent them from having priority over the liens of [other creditors] because they were already compensated for the money they provided." *Id.* at 799. "The issue is not whether those listed as beneficiaries in the deed of trust acted inequitably but rather whether those who recorded the deed did." *Id.* at 800. "It was not inappropriate to conclude that to compensate [the beneficiaries] over the rights of bona fide creditors would be inequitable." *Id.* at 800. The Alaska Court cited a 1991 5th Circuit ruling which held that obtaining a lien on corporate assets in order to secure capital contributions is inequitable conduct. *Id.* at footnote 22 (citing *In re Fabricators, Inc.,* 926 F.2d 1458, 1467-68 (5th Cir. 1991). The trial court ruled that the shareholder "breached his fiduciary duty to the creditors by attempting

to place the interests of...shareholders in the corporation, over the interests of third-party creditors. The execution of the deed of trust was done at a time when both corporations were grossly undercapitalized. Such conduct constituted a fraudulent conveyance, hindered creditors and was 'inequitable conduct.'" *Id.* at 795-96. "Once inequitable conduct is found, equitable subordination can be employed as long as there is either an injury to the creditor or an unfair advantage conferred to the claimant and as long as the remedy does not violate bankruptcy law." *Id.* at footnote 16 (citing *In re Mobile Steel Co.,* 563 F.2d 692, 700 (5th Cir. 1977); *In re Fabricators, Inc.* 926 F.2d 1458, 1464-65 (5th Cir. 1991)).

According to the Alaska Court in *Nerox,* "[t]he determination of whether the capitalization of a corporation is sufficient is based on whether the corporation has sufficient capital to satisfy its likely business obligations." *Id.* at 803 (citing *Fiumetto v. Garrett Enters., Inc.,* 749 N.E.2d 992, 1005 (Ill.App. 2001)). "This matter is assessed in relation to the corporation's operations." *Id.* at 803 (citing *Stirling-Wanner v. Pocket Novels, Inc.,* 879 P.2d 210, 213 (Or.App. 1994)). Idaho's Supreme Court has addressed the issue of undercapitalization stating: "[F]inancial inadequacy is measured by the nature and magnitude of the corporate undertaking or the reasonableness of the **cushion for creditors** at the time of the *inception* of the corporation." *Pierson v. Jones,* 102 Idaho 82, 84, 625 P.2d 1085 (1981)(Bold emphasis added, italics in original). Accepting Idaho Development's assertions that a loan was made by Idaho Development and no capital contributions were ever made by Idaho Development or Rothchild Properties, Teton View would have been indebted in the amount of $1,100,000 the day after Teton View was formed. Even if the entire 'loan' was used to purchase capital assets, Teton View would be unable to have greater equity than debt. The only possible equity that Teton View could

claim prior to any lot sales would be the equity that other creditors, such as DePatco, created through improvements to the properties. Such gross undercapitalization clearly would not satisfy Teton View's likely business obligations. The Joint Venture Agreement designated that "the parties [will] create a joint venture to provide Teton View Golf Estates, LLC, **investment capital** and active participation as it relates to that certain development known as Teton View Estates...." *See* Joint Venture Agreement, dated February 28, 2008, pg. 1, attached as Exhibit 'A' to the Affidavit of Mark R. Fuller (emphasis added). Yet, if the $1,100,000 (now $850,000) is treated as a loan, there was absolutely no investment capital in the business at its inception. Business operations could not be accomplished without the investment capital required by the Joint Venture Agreement, and yet there was none contributed.

If Idaho Development's $1,100,000 (now $850,000) advancement is treated as a loan, then at the time DePatco contracted to provide labor and materials, Teton View had absolutely no risk capital. If Teton View has no risk capital to satisfy creditors, then DePatco was forced to bear the same risk as an investor, where it would only be paid if the business realized a profit beyond repayment of Idaho Development's 'loan'. Citing a New York University Law Review article, a New York Bankruptcy Court noted:

> [B]oth investors and creditors accept the risk of enterprise insolvency but to a different degree. This stems from their dissimilar expectations. Even if the business prospers, the creditor anticipates no more than the repayment of his fixed debt. Further, the shareholder's investment provides an **equity cushion for the repayment of the claim**. The investors, on the other hand, share the profits to the exclusion of the creditors. The shareholder's enhanced risk of insolvency represents the flipside of his unique right to participate in the profits. The allocation of the risk, as between the investor and the creditor, is reflected in the absolute priority rule, **and should not be reallocated**.

In re Granite Partners, L.P., 208 B.R. 332, 336 (Bankr. S.D.N.Y. 1997)(emphasis added; citations omitted). If Idaho Development's Deed of Trust has priority over DePatco's lien claim, DePatco has no hope of payment until Idaho Development recoups its entire 'loan', including interest. If Teton View makes no sales, there would not even be enough equity to cover Idaho Development's full claim. Due to undercapitalization, DePatco's claim is completely subject to the success of Teton View's real estate development venture, a risk only investors should be required to bear. Idaho Development seeks the reduced risk of a secured creditor, but claims entitlement to the profit returns of an investor.

DePatco requested Idaho Development to admit that the $1.1 million (now $850,000) 'loan' was the only contribution made by Idaho Development. Idaho Development denied that Request for Admission. *See* Response to Request for Admission No. 5, attached as Exhibit 'C' to the Affidavit of Mark R. Fuller. In response to Interrogatory No. 9, Idaho Development explained its denial of that Request for Admission identifying the following contribution by Idaho Development to Teton View: "Mr. Spafford had requested David Clark try and find a loan. Mr. Clark made efforts to try and find a construction loan for the project". *See* Plaintiff's Response to Interrogatory No. 9(2), attached as Exhibit 'C' to the Affidavit of Mark R. Fuller. Assuming the $1.1 million (now $850,000) is a loan secured by a deed of trust, Idaho Development's only investment in Teton View would be David Clark's unsuccessful attempt to try and find a construction loan. The only "third party construction financing" ever provided to this project came from contractors such as DePatco, and Idaho Development expressly agreed in the Joint Venture Agreement to subordinate its claim to such financing.

Conclusion

Whether the $1.1 million (now $850,000) contributed by Idaho Development is treated as a capital contribution or a loan, the result is the same from DePatco's perspective. If the funds are recharacterized as capital contributions, then Idaho Development cannot hide behind a subsequent Promissory Note and Deed of Trust to protect its risk capital to the detriment of Teton View's legitimate creditors, including DePatco. Such acts by Idaho Development would clearly be a violation of its fiduciary obligations to creditors. If the funds are treated as a loan, then Idaho Development's claim should be equitably subordinated to DePatco's lien claims because of Idaho Development's inequitable conduct. Teton View was grossly undercapitalized from its inception. If the $1,100,000 (now $850,000) is treated as a loan, then Rothchild Properties and Idaho Development, the original shareholders in Teton View, have not contributed **any** investment capital to the joint venture. Allowing Idaho Development to protect its risk capital as if it were a secured creditor would be a gross inequity to the detriment of DePatco and other Teton View creditors.

No genuine issue of material fact prevents Summary Judgment on DePatco's Motion for recharacterization or equitable subordination of Idaho Development's Deed of Trust claims. Whether the funds contributed by Idaho Development were capital contributions or loans, the claim for repayment of those funds should not have priority to DePatco's establised materialman's lien claim. Allowing Idaho Development to secure its capital contribution would authorize a breach of fiduciary duty, whereby LLC members could completely avoid investor's risk by encumbering LLC property to repay the very funds used to purchase the member's ownership interest in the LLC. Such a scheme

would impose a great injustice on non-owner creditors and have a destructive effect on the structure of limited liability entities. Idaho Development's promissory note and original and amended deed of trusts should be equitably subordinated to the lien claim of DePatco.

DATED this 4 day of January, 2010.

Mark R. Fuller
Attorney for Defendant – DePatco, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and correct copy of the following described pleading or document on the attorney listed below on this 4th day of January, 2010:

Document Served: MOTION FOR PARTIAL SUMMARY JUDGMENT

Persons Served:

Alan R. Harrison, Esq.
ALAN HARRISON LAW, PLLC
497 N. Capital Ave., Ste. 210
Idaho Falls, ID 83402

__x__ U.S. Mail
____ Facsimile
____ Hand Delivery

Jeffrey Brunson, Esq.
BEARD ST. CLAIR
2105 Coronado
Idaho Falls, ID 83404

__x__ U.S. Mail
____ Facsimile
____ Hand Delivery

Karl Decker, Esq.
HOLDEN KIDWELL HAHN & CRAPO
P.O. Box 50130
Idaho Falls, ID 83405

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____ Facsimile
____ Hand Delivery

Rick Hajek (Amerititle)
1650 Elk Creek
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Kipp L. Manwaring, Esq.
JUST LAW OFFICE
P.O. Box 50271
Idaho Falls, ID 83405

__x__ U.S. Mail
____ Facsimile
____ Hand Delivery

Mark R. Fuller
FULLER & CARR

520

Jeffrey D. Brunson, ISB No. 6996
Beard St. Clair Gaffney PA
2105 Coronado Street
Idaho Falls, ID 83404-7495
Phone: (208) 523-5171
Fax: (208) 529-9732

Attorneys for Defendant, Schiess & Associates, P.C.

DISTRICT COURT SEVENTH JUDICIAL DISTRICT BONNEVILLE COUNTY IDAHO

IDAHO DEVELOPMENT, LLC, a Utah limited liability company,

Plaintiff,

vs.

TETON VIEW GOLF ESTATES, LLC, a Utah limited liability company; ROTHCHILD PROPERTIES, LLC, a Utah limited liability company; WESTERN EQUITY, LLC, a Utah limited liability company; AMERITITLE COMPANY; ZBS, LLC, an Idaho limited liability company; DEPATCO, INC., an Idaho Corporation; SCHIESS & ASSOCIATES, P.C., an Idaho Professional Service Corporation; HD SUPPLY WATERWORKS, LTD,; DOES 1-3, and ALL PERSONS IN POSSESION OF REAL PROPERTY DESCRIBED HEREIN.

Defendants.

SCHIESS & ASSOCIATES, P.C., an Idaho Professional Service Corporation,

Counterclaimant,

vs.

IDAHO DEVELOPMENT, LLC, a Utah limited liability company.

Counterdefendant.

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Case No.: CV-08-4395

SCHIESS & ASSOCIATES, P.C.'S RESPONSE TO DEPATCO'S MOTION FOR PARTIAL SUMMARY JUDGMENT

SCHIESS & ASSOCIATES, P.C., an Idaho Professional Service Corporation,

Crossclaimant,

vs.

TETON VIEW GOLF ESTATES, LLC, a Utah limited liability company; ROTHCHILD PROPERTIES, LLC, a Utah limited liability company; WESTERN EQUITY, LLC, a Utah limited liability company; AMERITITLE COMPANY; ZBS, LLC, an Idaho limited liability company; DEPATCO, INC., an Idaho Corporation; HD SUPPLY WATERWORKS, LTD,; DOES 1-3, and ALL PERSONS IN POSSESION OF REAL PROPERTY DESCRIBED HEREIN.

Crossdefendants.

SCHIESS & ASSOCIATES, P.C., an Idaho Professional Service Corporation,

Third Party Plaintiff,

vs.

BRAD ZUNDEL, an individual; JIM ZUNDEL, an individual.

Third Party Defendants.

Defendant/Counterclaimant/Crossclaimant/Counterdefendant, Schiess & Associates, P.C. (Schiess), by and through counsel of record, responds to DePatco's Motion for Partial Summary Judgment as follows. Schiess joins in the motion and argument to the extent Idaho Development's claim should be recharacterized as capital contributions and be subordinated. The argument that DePatco is making applies equally to Schiess i.e. Idaho Development's claim should be subordinated to that of Schiess and DePatco.

Priority issues as to Schiess and DePatco and other claimants are yet to be litigated. It is Schiess's position that it has first priority based on Idaho Code §§ 45-506 and 45-512 and *Ultrawall, Inc. v. Trepagnier*, 135 Idaho 832, 25 P.3d 855 (2001); *Pacific States Sav., Loan, and Bldg. Co. v. Dubois*, 11 Idaho 319, 83 P. 513 (1905).

Schiess respectfully requests that Idaho Development's claim be subordinated to its claim on the same basis set forth in DePatco's motion for partial summary judgment.

Dated: January 25, 2010.

Jeffrey D. Brunson
Of Beard St. Clair Gaffney PA
Attorneys for Schiess & Associates, P.C.

CERTIFICATE OF SERVICE

I certify that I am a licensed attorney in the State of Idaho and that on January 25, 2010, I served a true and correct copy of the SCHIESS & ASSOCIATES, P.C.'S RESPONSE TO DEPATCO'S MOTION FOR PARTIAL SUMMARY JUDGMENT upon the following by the method of delivery designated:

Alan Harrison — ☐ US Mail ☐ Hand delivered ☑ Facsimile
Alan R. Harrison Law
497 N Capital Avenue, Suite 210
Idaho Falls, ID 83402
Fax: 552-1176
Idaho Development

Karl Decker — ☐ US Mail ☐ Hand delivered ☑ Facsimile
Holden Kidwell
PO Box 50130
Idaho Falls, ID 83405-0130
Fax: 523-9518
ZBS, LLC

Mark Fuller — ☐ US Mail ☐ Hand delivered ☑ Facsimile
Fuller & Carr
PO Box 50935
Idaho Falls, ID 83405-0935
Fax: 524-7167
DePatco

Douglas Hookland — ☐ US Mail ☐ Hand delivered ☑ Facsimile
Scott Hookland
PO Box 23414
Tigard, OR 97281-3414
Fax: 503-620-4540
HD Supply

Richard Mollerup — ☐ US Mail ☐ Hand delivered ☑ Facsimile
Meuleman Mollerup
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Boise, ID 83702
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Alliance Title & Escrow

524

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Manwaring Law Office
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Sandra McArthur

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Lynn C. Spafford
Teton View Golf Estates, LLC
PO Box 711946
Salt Lake City, UT 84171

☑ US Mail ☐ Hand delivered ☑ Facsimile

Tony M. Versteeg
Western Equity, LLC
Rothchild Properties
11105 S. Londonberry Drive
Draper, UT 84092

☑ US Mail ☐ Hand delivered ☑ Facsimile

Bonneville County Courthouse
605 N Capital Avenue
Idaho Falls, ID 83402
Fax: 529-1300

☐ US Mail ☐ Hand delivered ☑ Facsimile

Jeffrey D. Brunson
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Attorneys for Schiess & Associates, P.C.

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497 N. Capital Ave, Suite 210
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Telephone: (208) 552-1165
Fax: (208) 552-1176
(ISB#: 6589)

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

IDAHO DEVELOPMENT, LLC, a Utah limited liability company, Plaintiff, vs. TETON VIEW GOLF ESTATES, LLC, a Utah limited liability company; ROTHCHILD PROPERTIES, LLC, a Utah limited liability company; WESTERN EQUITY, LLC, a Utah limited liability company; AMERITITLE COMPANY; ZBS, LLC, an Idaho limited liability company; DEPATCO, INC., an Idaho Corporation; SCHIESS & ASSOCIATES, P.C., an Idaho Professional Service Corporation; HD SUPPLY WATERWORKS, LTD,; DOES 1-3, and ALL PERSONS IN POSSESSION OF REAL PROPERTY DESCRIBED HEREIN, Defendants.	Case No. CV-08-4395 **AFFIDAVIT OF PLAINTIFF'S COUNSEL IN SUPPORT OF OPPOSITION TO DEPATCO'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

STATE OF IDAHO)
) ss.
County of Bonneville)

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Alan R. Harrison, being first duly sworn under oath, deposes and states as follows:

1. I am the attorney for the Plaintiff in the above-entitled action, and make this Affidavit to comply with Rule 55 of the Idaho Rules of Civil Procedure.

2. Attached as Exhibit A is a true and correct copy of the Promissory Note for ZBS.

3. Attached as Exhibit B is a true and correct copy of the bid proposal from DePatco.

4. Attached as Exhibit C is a true and correct copy of the Articles of Incorporation for DePatco, Inc. filed with the Idaho Secretary of State.

DATED this 25th day of January, 2010.

Alan R. Harrison
Attorney for Plaintiff

SUBSCRIBED AND SWORN TO before me this 25 day of January, 2010.

DEBORAH C. TAYLOR
Notary Public
(seal) State of Idaho

Notary Public for Idaho
Residing at: Idaho Falls
My Commission Expires: 12.4.2015

PROMISSORY NOTE
SECURED BY DEED OF TRUST

$640,000.00 February 19, 2008

I promise to pay to the order of ZBS, LLC, an Idaho Limited Liability Company, SIX HUNDRED FORTY THOUSAND AND NO/100ths DOLLARS, payable in lawful money of the United States of America, with interest thereon in like money, from March 4, 2008 until paid, at the rate of 9.0000 per cent per annum. Principal and interest to be paid as follows:

An interest only payment shall be due on or before March 31, 2008 and a like interest only payment shall be due on or before the 31st day Monthly thereafter until 02/28/2009 when all the remaining principal plus any accrued interest shall be due and payable. A balloon payment in the amount of $400,000.00 plus accrued interest shall be due and payable on or before 4/15/08 at which time the monthly interest only payment shall be recalculated based on the remaining principle balance at that time.

PARTIAL RELEASES: The release of one lot from the Deed of Trust shall be obtainable upon payment of 120% of the value of the lot purchase price plus accrued interest if applicable, until the remaining balance plus interest, if any is paid in full.

Buyer reserves the right to prepayment without penalty, however any such prepayment shall not operate to defer any scheduled payment as it may otherwise fall due.

Each payment shall be credited first on interest due and the remainder on principal; and interest shall thereupon cease upon the principal so credited. Should default be made in payment of any installment when due the whole sum of principal and interest shall become immediately due at the option of the holder of this note. Principal and interest payable in lawful money of the United States. If action be instituted on this note, We/I the undersigned, promise to pay such sum as the Court may fix as attorney's fees. The maker and endorser hereon jointly and severally waive presentment for payment, demand, protest and notice of protest of non-payment of this note. This note is secured by a DEED OF TRUST OF EVEN DATE.

This note is due and payable on or before February 28, 2009.

Teton View Gulf Estates, LLC

by _____
St Charles Group, Inc., By

by _____
Western Equity, LLC, by

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EXHIBIT A

*Book = 23 lots # 21,187.85 per Lot

Phone: (208) 624-3836

DEPATCO INC

Fax: (208) 458-4043

HOLLAND / BRIAN SARGENT

2205 East 200 North • St. Anthony, ID 83445

Date: 6/10/08

BID PROPOSAL FOR: TETON VIEW SUBDIVISION

DePatco, Inc. proposes to furnish the following, for the above mentioned project located in Idaho Falls, Idaho.

-Please see the attached unit cost sheet dated 6/10/08 , and the time line schedule.

DePatco, Inc. agrees to provide all materials, labor as detailed in the above items in the unit cost. All work done will be billed as per unit prices verified by your engineer.

Estimated total cost based on your itemized bid sheet is.....**$1,695,028.00**

The total of the unit prices determined by multiplying the quoted unit prices by the total units utilized in the project.

If you have any question please feel free to contact me on my cell at 716-1911 or in the office at 624-3836.

Exclusions:

The above bid does NOT include the following items:
Sinking, engineering and testing.
Fees or permits of any kind
Change of conditions, plans or specs.
Rock excavation
Soft sub-grade excavation and backfill
Haul and cover
Winter conditions
Conduits in power trench—this will be added upon receiving final plan.
Chip seal road next year—this item can not be bid due to oil price changes. HK is t holy good Chipping company in the area and they will have to quote it to you next year.

Escalator clause:

Due to the volatility in the cost of concrete, asphalt, pipe, and fuel, this contract price may change. This bid reflects the current prices of the market on bid day.

Owner contracts with DePatco Inc. to perform the work on the terms and conditions herein set forth (including the terms and conditions set forth on the attached sheets) and agrees to pay DePatco Inc for faithful performance of the work.

DePatco, Inc.
Authorized Signature: _____ Date: 6/17/08

Accepted By: _____ Date: 6/18/08

FOR ROTOLO CHRISTENSEN LLC
TETON VIEW SUBDIVISION

EXHIBIT B

DEPATCO, INC.
TERMS AND CONDITIONS

The following terms and conditions are entered into between DePatco, Inc. (DePatco) and the customer/owner (owner) referred to in the Estimate and/or Agreement and are expressly understood and agreed upon.

Standard of the Work
All work will be performed in accordance with the written plans and specifications submitted with this Estimate and Agreement, which become part of this agreement. As to specifications and procedures not stated in writing, the work will be performed in a good and workmanlike manner according to the standard practices of the industry. Any alteration or deviation from the above specifications involving extra costs will be executed only upon written agreement signed by both parties and will be charged over and above the previously agreed price.

Pricing of the work
Price is all inclusive unless stated otherwise. Unless an earlier limit is expressly stated, the prices herein stated shall be good for not more than thirty (30) days. Where unit prices are quoted, the total price shall be determined by multiplying the unit prices set forth herein by the quantities actually used. Unit volume will be determined according to DePatco's standard practices. If the work is terminated for any reason, DePatco shall be entitled to payment for all work done on its standard unit price. DePatco shall have no obligation to pay for any permits, fees or inspections required.

Timing of the Work
Unless specified in writing on the front of this agreement, DePatco makes no promise of the specified time for the work to be commenced or completed but agrees to perform the work with due diligence in connection with its other work.

Site Conditions
The pricing set forth in this agreement, unless expressly stated otherwise in the bid, is based on the mutual assumption that there shall be no need to excavate lava rock or other major rock deposits by blasting or other methods not normally used in the excavation of dirt or alluvial materials and that there will be no underground water or other conditions which will require special equipment, de-watering or other efforts. If such conditions are present, owner agrees to pay DePatco additional fair compensation for the extra work necessary to overcome unexpected conditions.

Insurance and Damages to Work In Progress
DePatco shall maintain worker's compensation insurance and liability insurance to cover its liability only. DePatco will not insure the owner. Should the work in progress be damaged by any accident or natural disaster such as wind, flood or earthquake, owner shall have the option to terminate the project and pay for the work done to date of destruction as provided herein or to pay DePatco the extra cost of repairing or replacing the damaged work in progress.

Finance charges and collection costs
Any invoice billed by DePatco not paid on time shall be subject to an eighteen percent (18%) per annum finance charge. Failure to pay on time may result in DePatco filing a lien on the subject property at its discretion. The cost of filing and releasing the lien will be borne by owner. Any and all other collection costs, including attorneys fees, incurred in DePatco's effort to collect the balance due with interest bearing eighteen percent (18%) per annum will be solely borne by owner.

Additional Terms and Conditions
DePatco requires a ten (10) day scheduling window. DePatco will not be held responsible for any loss caused by delays in manufacturing or subsequent shipping delays from its shippers or suppliers. Beginning of work is subject to approved credit of owner. By law, owner may require proof of our completed operations and worker's compensation insurance and the name, address and phone number of any subcontractors or material providers (aka subs). Owner may get extended coverage title insurance to protect against liens. By giving DePatco written notice and advance payment before the contract is finalized, owner may require that DePatco provide a surety bond in an amount up to the value of the project and/or that DePatco obtain lien waivers from any subs. By signing this contract, owner acknowledges receipt of this notice.

PROJECT: [redacted] DATE: 6-10-08

CONTACT: LOCATION: IDAHO FALLS

ENGINEER: BID NUMBER: 8-1534

BID ITEM	TOTAL UNITS	UNIT	UNIT DESCRIPTION	UNIT PRICE	TOTALS
			[redacted]		
1	34	EACH	SEWER MANHOLES	$2,500.00	$85,000.00
2	4,413	L.FT	8" SEWER MAIN--ON SITE	$24.00	$105,912.00
3	2,700	L.FT	12" SEWER MAIN--OFF SITE	$30.00	$81,000.00
4	80	L.FT	4" SEWER SERVICE	$750.00	$60,000.00
			[redacted]		
1	5,200	L.FT	8" WATER MAIN--ON SITE	$32.00	$166,400.00
2	5,900	L.FT	16" WATER MAIN--OFF SITE	$58.00	$342,200.00
3	80	EACH	1" WATER SERVICE AND METER BOX	$1,200.00	$96,000.00
4	18	EACH	8" WATER VALVES	$1,200.00	$21,600.00
5	7	EACH	16" WATER VALVES	$4,000.00	$28,000.00
6	10	EACH	VARIOUS FITTINGS	$1,000.00	$18,000.00
7	17	EACH	FIRE HYDRANT SYSTEMS	$3,500.00	$59,500.00
8	35	EACH	THRUST BLOCKS	$200.00	$7,000.00
			[redacted]		
1	9	EACH	STORM MANHOLES	$2,000.00	$18,000.00
2	18	EACH	CATCH BASINS	$1,200.00	$21,600.00
3	1,842	L.FT	12" STORM LINE	$28.00	$51,576.00
4	2	EACH	FRENCH DRAIN	$4,575.00	$9,150.00
			ROAD SYSTEM		
1	10,060	L.FT	CURB AND GUTTER	$14.00	$140,840.00
2	35,000	S.YD.	ROAD BASE	$4.00	$140,000.00
3	35,000	S.YD.	PAVING	$4.25	$148,750.00
4	35,000	S.YD.	SUBGRADE WORK	$2.20	$77,000.00
			[redacted]		
1	5,000	L.FT	POWER/UTILITY TRENCH	$3.50	$17,500.00
				TOTAL BID	$1,696,028.00

ARTICLES OF INCORPORATION

of

DEPATCO, INC.

RECEIVED
SEC. OF STATE
92 DEC 31 PM 2 14

The following Articles of Incorporation are hereby adopted pursuant to the Idaho Business Corporation Act:

1. Name.

The name of the corporation is:

DEPATCO, INC.

2. Duration.

The corporation shall have perpetual duration.

3. Purposes.

The corporation is formed for the purpose of owning, operating, and managing a construction company and real estate investment company and any or all other lawful business for which corporations may be incorporated under the Idaho Business Corporation Act.

4. Authorized Shares.

The corporation shall be authorized to issue 100,000 shares, all of one class, for a par value of $1.00 per share.

5. Registered Agent and Office.

The name of the initial registered agent and the address of the initial registered office of the corporation are:

DeVerl Stoddard
1717 East 400 North
St. Anthony, Idaho 83445

IDAHO SECRETARY OF STATE
19921231 0900 42025 2
CK #: 20361 CUST# 1
CORPORATIO 10 70.00= 70.00

532

EXHIBIT C

6. Directors.

The initial Board of Directors shall consist of two directors whose names and addresses are as follows:

Name	Address
DeVerl Stoddard	1717 East 400 North St. Anthony, Idaho 83445
Patty Stoddard	1717 East 400 North St. Anthony, Idaho 83445

7. Incorporators.

The name and address of the incorporator:

DeVerl Stoddard	1717 East 400 North St. Anthony, Idaho 83445

DATED: December 30th, 1992.

DeVerl Stoddard

STATE OF IDAHO,)
ss.
County of Madison.)

On this 30th of December, 1992, before me, the undersigned a notary Public in and for said State, personally appeared DEVERL STODDARD, known to me to be the person whose name are subscribed to the within instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Marsha L. Mahany
Notary Public for Idaho
Residing at: Rexburg, Id
My Commission Expires: 4-10-94

Alan R. Harrison
ALAN R. HARRISON LAW, PLLC
497 N. Capital Ave, Suite 210
Idaho Falls, Idaho 83402
Telephone: (208) 552-1165
Fax: (208) 552-1176
(ISB#: 6589)

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

IDAHO DEVELOPMENT, LLC, a Utah limited liability company, Plaintiff, vs. TETON VIEW GOLF ESTATES, LLC, a Utah limited liability company; ROTHCHILD PROPERTIES, LLC, a Utah limited liability company; WESTERN EQUITY, LLC, a Utah limited liability company; AMERITITLE COMPANY; ZBS, LLC, an Idaho limited liability company; DEPATCO, INC., an Idaho Corporation; SCHIESS & ASSOCIATES, P.C., an Idaho Professional Service Corporation; HD SUPPLY WATERWORKS, LTD.; DOES 1-3, and ALL PERSONS IN POSSESSION OF REAL PROPERTY DESCRIBED HEREIN, Defendants.	Case No. CV-08-4395 **PLAINTIFF'S RESPONSE TO DEPATCO'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

FACTS

Idaho Development, LLC (Idaho Development) loaned $1,100,000 to Teton View Golf Estates, LLC (Teton View) with the understanding that upon the funding of the construction loan, Idaho Development shall be repaid the sum of $800,000 and subordinate $300,000 to the construction loan. *Exh. A to Aff. of Mark Fuller.* Idaho Development secured this loan by a promissory note and deed of trust. The deed of trust was recorded. Teton View did not obtain a construction loan prior to May 28, 2008, the maturity date of the promissory note and deed of trust. Idaho Development agreed to an extension of the payment for one month in exchange for $10,000. Teton View signed a bid proposal from DePatco, Inc. (DePatco) on June 17, 2008. Idaho Development was being told that DePatco would subordinate its first $500,000 of work to a construction loan. Idaho Development was not asked by Teton View or DePatco to subordinate its deed of trust to the work being done by DePatco.

DePatco has filed the present motion seeking the Court to recharacterize Idaho Development's loan to Teton View as a capital contribution or to equitably subordinate Idaho Development's loan to DePatco's materialman's lien.

SUMMARY JUDGMENT STANARD

The standard has been set forth in DePatco's Motion for Partial Summary Judgment.

ARGUMENT

1. IDAHO CASES DO NOT SUPPORT RECHARACTERIZING IDAHO DEVELOPMENT'S LOAN AS A CAPITAL CONTRIBUTION OR EQUITABLING SUBORDINATING THE LOAN TO DEPATCO'S LIEN.

Idaho Development's advancement of money to Teton View was a loan subject to repayment at a definite maturity date and should not be recharacterized as a capital contribution or be equitably subordinate to DePatco's materialman's lien.

The Tenth Circuit distinguishes recharacterization from equitable subordination. In *In re Hedged-Investments Associates, Inc.*, 380 F.3d 1292 (10th Cir.2004), it stated:

> When a putative loan to a corporation is recharacterized, the courts effectively ignore the label attached to the transaction at issue and instead recognize its true substance. ...
>
> The doctrine of equitable subordination, by contrast, looks not the substance of the transaction but to the behavior of the parties involved. The funds in questions are still

> considered outstanding corporate debt, but the courts seek to remedy some inequity or unfairness perpetuated against the ... other creditors or investors by postponing the subordinated creditor's right to repayment until others' claims have been satisfied. ...
>
> Recharacterization cases turn on whether a debt actually exists, not on whether the claim should be equitably subordinated. In a recharacterization analysis, if the court determines that the advance of money is equity and not debt, the claim is recharacterized and the effect is subordination of the claim as a proprietary interest because the corporation repays capital contributions only after satisfying all other obligations of the corporation. In an equitable subordination analysis, the court is reviewing whether a legitimate creditor engaged in inequitable conduct, in which case the remedy is subordination of the creditor's claim to that of another creditor only to the extent necessary to offset injury or damage suffered by the creditor in whose favor the equitable doctrine may be effective.

Hedged-Investments Associates, Inc., 380 F.3d at 1297; citing *Beyer Corp. v. MascoTech, Inc.*, 269 F.3d 726, 748-49

Idaho has stated that those jurisdictions which have permitted a "dominate shareholder to become a creditor of his corporation state that the transaction will be 'carefully scrutinized' to achieve the ends of justice and fairness. In general, the dealings must be in good faith, for the benefit of the corporation in an honest effort to carry on its business, without injury to the rights of others existing or potential creditors, treated as a loan by the parties involved, and contain no elements of fraud or misrepresentation." *Weyerhaeuser Co. v. Clark's Material Supply Co.*, 90 Idaho 455, 461, 413 P.2d 180 (1966).

The *Weyerhaeuser* Court found the advancement to be a capital contribution since the corporate records did not list Mr. Clark as a creditor, "nor was a note executed to the Clarks by the corporation promising to indemnify them in the event the property they posted as security was foreclosed to satisfy the Kleiner loan." *Id.* at 459-60. The Clarks did not regard it as a loan until they filed a claim with the receiver. *Id.* at 459.

A member of a business can become a creditor of the business as long as the transaction is a bona fine transaction. *Tanzi v. Fiberglass Swimming Pools*, 414 A.2d 484, 488 (Sup. Ct Rhode Island 1980).

In *Lettunich v. Lettunich*, 141 Idaho 425, 111 P.3d 110 (2005), the Idaho Supreme Court determined money given to a partnership was a capital contribution even though the individual was saying he did not intend the money to be a capital contribution. *Id.* at 432-33. This was based on the fact that the "record contains no loan agreement, check, or other documentation to

shed light on who contributed" the money. *Id.* at 433. The other partner did not intend for this to be a loan and interest was never discussed. *Id.*

In *Vreeken v. Lockwood Engineering*, 2009 Opinion No. 127 (2009), the Idaho Supreme Court determined certain assets bought by the company were capital contributions, even though the owner stated he intended these to be loans or leases to the company. The Court stated, "[m]ost notably, there is no lease agreement or evidence of lease payments in the record."

Idaho Development's advancement of money to Teton View was characterized as a "commercial loan" in the escrow instructions drafted by Mr. Spafford. The deed of trust and promissory note were prepared in order to secure the money given to Teton View. The joint venture agreement indicated Idaho Development would give $1,100,000 with the understanding that upon the funding of the construction loan, Idaho Development would be repaid $800,000 with the remaining $300,000 being subordinated to the construction loan. Ms. Boswell's affidavit indicates she loaned the money with the full intention of being repaid at the maturity date, May 28, 2008. She received interest after she made the loan and was very proactive in seeking repayment when the loan was not timely paid back.

In looking at the documents signed (promissory note, deeds of trust, joint venture agreement, and articles of organization) at the time Idaho Development loaned money to Teton View, the Court needs to determine the intent of the parties. The escrow instructions say this is a commercial loan. A promissory note and deed of trust also evidence this fact. When reviewing the promissory note and the joint venture agreement there is a conflict between how much Idaho Development agreed to subordinate ($300,000[1] or $500,000[2]). The escrow instructions only say $300,000. The amount on the promissory note was a mistake. In addition, Idaho Code § 29-109 "provides that where a contract consists partly of a printed form and partly of a written matter prepared with special reference to the particular transaction, the written matter controls where there is conflict." *Werry v. Phillips Petroleum Co.*, 97 Idaho 130, 136, 540 P.2d 792 (1975). When words are written into the contract in pencil, they control over the printed portion of the printed contract. *Idaho Products Co. v. Bales*, 36 Idaho 800, 806, 214 P. 206 (1923). Therefore, Idaho Development only agreed to subordinate $300,000, not $500,000, as indicated by the handwriting in the joint venture agreement.

[1] See Joint Venture Agreement attached as Exhibit A to Affidavit of Mark Fuller.
[2] See Promissory Note attached as Exhibit B to Affidavit of Mark Fuller.

All of the above evidence in this case showing Idaho Development's advancement was a loan is in contrast to the lack of documentation found to be missing in *Weyerhaeuser*, *Lettunich*, and *Vreeken*. Therefore, these three cases, in which the Court found the advancements to be capital contributions, are distinguishable from the present case.

Idaho Development's advancement to Teton View was done in good faith to purchase property with the full expectation of being paid back the majority of the money within 90 days. The loan was not given to harm any existing creditors of Teton View. ZBS took a deed of trust for $640,000 and a promissory note. The promissory note called for Teton View to make a balloon payment of $400,000 on April 15, 2008. *Exh. A to Aff. of Alan Harrison.* Teton View did not ask Idaho Development to put up more funds to pay ZBS, nor did ZBS ask Idaho Development to pay the $400,000.

Idaho Development's loan was also not given to harm potential creditors of Teton View. Teton View set aside some money to take care of the day to day operations, which would pay Teton View's potential creditors until a construction loan was obtained. At the time Teton View was formed, DePatco was not a potential creditor of Teton View. Teton View had no ability to pay a contractor such as DePatco without a construction loan. When Idaho Development loaned the money to Teton View and received a promissory note and recorded a deed of trust, Idaho Development in no way anticipated Teton View would hire DePatco and agree to pay $1,695,028 prior to a construction loan being in place. *Exh. B to Aff. of Alan Harrison.* This fact is further made clear by the fact that Teton View still owed ZBS $400,000 and the joint venture agreement stated it would pay $800,000 to Idaho Development upon funding of a construction loan. The facts lead to the conclusion that Teton View's managers, Mr. Spafford and Mr. Versteeg, did not want to lose a building season and were hoping a construction loan would be obtained prior to any bills coming due from DePatco. Idaho Development was being told DePatco would subordinate the first $500,000 to a construction loan and this is why they had started work without a construction loan being in place. There is no evidence of inequitable conduct on the part of Idaho Development in seeking to secure its loan when Teton View was formed to the determinate of any creditor of Teton View.

It would be inequitable to subordinate Idaho Development's deed of trust behind DePatco's materialman's lien. DePatco failed to obtain security prior to starting construction. DePatco could have viewed any deeds of trust on the property to determine what was currently

owed for the project. The Idaho legislature has established a recording system to allow those who are dealing with property determine their potential interests in the property. The statues provide that "[e]very conveyance of real property acknowledged or proved, and certified, and recorded as prescribed by law, from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers and mortgag(e)es." Idaho Code § 55-811. Idaho has established the recording system to help establish priorities amongst creditors for the same parcel of land. I.C. §55-812. The Idaho Court of Appeals quoted the Idaho Supreme court as stating:

> The purpose of the recording act in a race-notice jurisdiction, like Idaho, is to allow recorded interests to be effective against unrecorded interests when the recorded interest is taken for a valuable consideration and in good faith. *Langroise v. Becker*, 96 Idaho 218, 220, 526 P.2d 178, 180 (1974); *see also Farm Bureau Finance Co. v. Carney*, 100 Idaho 745, 605 P.2d 509 (1980).

Sun Valley Land and Minerals, Inc. v. Burt, 123 Idaho 862, 866, 853 P.2d 607 (Ct.App. 1993) .

DePatco could have required sufficient evidence from Teton View or any of its potential lenders to show money was available to pay for the construction. DePatco did not ask Idaho Development to subordinate its deed of trust to the construction being done by DePatco. DePatco made the choice to begin work prior to a construction loan being in place or further confirmation from Teton View that it would be paid.

DePatco filed its Articles of Incorporation on December 31, 1992 "for the purpose of owning, operating, and managing a construction company and real estate investment company." *Exh. C. to Aff. of Alan Harrison.* Therefore, DePatco has been in the construction industry for many years prior to this transaction. On the other hand, Ms. Boswell, manager of Idaho Deveopment, had no prior experience in real estate construction, joint ventures, or loaning money. She was relying upon Teton View's managers telling her if she gave this large amount of money, she had just inherited 2 months previous, they would give her a promissory note and deed of trust to insure she had a first position on the property. Ms. Boswell's affidavit indicates she would never have lent the money without a promissory note and deed of trust on the property securing her money she gave to Teton View. She was not intending to place $1,100,000 at risk. While she didn't understand all the wording in the paperwork, she took sufficient steps for the court to consider the amount she gave to Teton View as a loan and not a capital contribution.

There has been no showing by DePatco of bad faith on the part of Idaho Development. Idaho Development obtained the promissory note and deed of trust several months before DePatco ever came into the picture. It would be inequitable to subordinate Idaho Development's deed of trust behind DePatco's materialman lien.

2. CASES IN OTHER JURISDICTIONS DO NOT SUPPORT RECHARACTERIZING IDAHO DEVELOPMENT'S LOAN AS A CAPITAL CONTRIBUTION OR EQUITABLING SUBORDINATING THE LOAN TO DEPATCO'S LIEN.

In looking at other jurisdictions who have been faced with the issue of recharacterization and equitable subordination the Courts have set up a variety of factors which provide a more exhaustive set of factors to analyze than the Idaho decisions previously cited. Recharacterization of a loan to a company requires the court to "effectively ignore the label attached to the transaction at issue and instead recognize its true substance." *In re Hedged-Investments Associates, Inc.*, 380 F.3d 1292, 1297 (10th Cir. 2004).[3] The *Hedged-Investments* Court stated:

> We consider the following factors to distinguish true debt from camouflaged equity:
> (1) the names given to the certificates evidencing the indebtedness;
> (2) the presence or absence of a fixed maturity date;
> (3) the source of payment;
> (4) the right to enforce payment of principal and interest;
> (5) participation in management flowing as a result;
> (6) the status of the contribution in relation to regular corporate creditors;
> (7) the intent of the parties;
> (8) "thin" or adequate capitalization;
> (9) Identity of interest between creditor and stockholder;
> (10) Source of interest payments;
> (11) The ability of the corporation to obtain loans from outside lending institutions;
> (12) The extent to which the advance was used to acquire capital assets; and
> (13) The failure of the debtor to repay on the due date or to seek a postponement.
> *Stinnett's Pontiac Serv., Inc. v. Comm'r of Internal Revenue*, 730 F.2d 634, 638 (11th Cir. 1984). None of these factors is dispositive and their significance may vary depending on the circumstances.

Id. at 1298.

(1) Names given to the certificates evidencing the indebtedness

"The issuance of a stock certificate indicates an equity contribution; the issuance of a bond, debenture, or note is indicative of a bona fide indebtedness." *Stinnett's*, 730 F.2d at 638,

[3] This case was cited in DePatco's motion for partial summary judgment as S*ender v. Bronze Group, Ltd.*, 380 F.3d 1292 (10th Cir. 2004). The names used in this brief is the name given to the case when researched on Casemaker.

quoting Estate of Mixon v. United States, 464 F.2d 394, 403 (5th Cir. 1972). In the present case, a joint venture agreement was signed which stated the joint venture was formed to provide investment capital and active participation. *Exhibit A to Aff. of Mark Fuller,* p. 1. It further stated:

> Idaho Development, LLC is to initially contribute One Million One Hundred Thousand Dollars ($1,000,000.00) to the joint venture, **with the understanding that upon the funding of the construction loan,** Idaho Development shall be repaid the sum of Eight Hundred Thousand Dollars ($800,000.00), and shall subordinate the remaining sum of Five Hundred Thousand Dollars ~~($500,000.00)~~ ($300,000)[4] to the construction loan. It shall be repaid the balance of its investment under a lot release formula to be defined in the Second Deed of Trust and Trust Note securing the investment.

Exhibit A to Aff. of Mark Fuller, pp.1-2 (emphasis added).

The promissory note indicates the $1,100,000.00 was to be repaid by May 28, 2008, but at Teton View's "option, Idaho Development agrees to leave the sum of $500,000.00 in the project and to then subordinate to any third party construction financing." *Exhibit B to Aff. of Mark Fuller.*

The original deed of trust dated February 29, 2008, between Idaho Development and Teton View, was for $1,100,000.00 with final payment due on May 28, 2008. *Exhibit B to Aff. of Mark Fuller.* The original deed of trust was amended on March 7, 2008 to the amount of $850,000.00. *Exhibit B to Aff of Mark Fuller.* Idaho Development signed this amended deed of trust based upon representations of Lynn Spafford and Tony Versteeg that this needed to be done. Idaho Development did not get another deed of trust or any further security for the remaining $250,000.00 it had loaned to Teton View at this time.

When these documents are read together it shows the true intent of the parties. Melinda Boswell's affidavit states the true intent of the parties at the time Teton View was formed was for Idaho Development to put up $1,100,000.00. Idaho Development would then be repaid $800,000.00 upon the funding of a construction loan and subordinate the remaining $300,000.00 to the construction loan. The misprint of $500,000 was corrected in the joint venture agreement, which was signed and initialed by both parties to the joint venture agreement. The misprint in the promissory note was not corrected.

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[4] The $300,000 is handwritten above the strikethrough with the initials of MB (Melinda Boswell) and TV (Tony Versteeg) next to the handwritten amount.

When the construction financing was available, another deed of trust and promissory note were to be executed to secure the remaining amount owed to Idaho Development. This is more like they were dealing with each other as creditor and debtor rather than as partners. If it would have been as partners then there would be no need for a deed of trust or second deed of trust on the amount subordinated – a 33.3% interest would have been sufficient. Idaho Development never intended to subordinate their position without further security that they were going to be paid back the money given to Teton View, ie a new deed of trust and promissory note for the remaining amount owed.

Idaho Development did not anticipate subordinating to any other third party financing or work being done on the property without first being repaid the $800,000. At the time DePatco began work on the property, Idaho Development had an amended deed of trust securing $850,000 and ZBS had a deed of trust securing $640,000. DePatco has never obtained either Idaho Development's or ZBS's agreement to subordinate their deeds of trust to DePatco's construction work. Idaho Development would not have subordinated its deed of trust to DePatco's work without first being paid $800,000. Idaho Development was aware DePatco started work on the property. Mr. Spafford assured Idaho Development that DePatco would subordinate the first $500,000 to the construction loan they were going to obtain. Even if DePatco claims they never agreed to this, it does not change the fact Idaho Development was being told this information and reasonably relied upon it. In addition, Idaho Development was not the ones running the day to day operations and managing Teton View, Lynn Spafford and Tony Versteeg were doing this. *Exh. D to Aff. of Mark Fuller,* p. 2 (management); *Exh. A to Aff. of Mark Fuller*, p. 2 (conduct of enterprise). Idaho Development had no contact with DePatco and was not part of any discussions regarding DePatco starting work prior to the construction loan being in place.

There is also no evidence that DePatco viewed a copy of the promissory note and relied upon it as a source of payment for the work it was doing. "Just as labels cannot serve to transform substantive equity into debt, *Gregory v. Helvering*, 293 U.S. 465, 55 S.Ct. 266, 79 L.Ed. 596 (1935); *Rowan v. United States, supra*, they cannot act to alter the characterization of what otherwise would be considered in substance debt." *Estate of Mixon v. United States*, 464 F.2d 394, 404 (5th Cir. 1972). DePatco should not be allowed to come back after the fact and try to ask for the Court to exercise its equitable powers to recharacterize Idaho Developments deeds

of trust as a capital contribution, based upon several conflicting documents not prepared by Idaho Development, when DePatco did not take action when it started work to ensure there was adequate funding to be paid or to get those with recorded deeds of trust to subordinate to the work they were doing.

(2) the presence or absence of a fixed maturity date;

"The presence of a fixed maturity date indicates a fixed obligation to repay, a characteristic of a debt obligation." *Estate of Mixon*, 464 F.2d at 404. The absence of a fixed maturity date is indicative of an equity advance. *Id.* The promissory note and the deed of trust both indicate a fixed maturity date of May 28, 2008. It was anticipated by this time a construction loan would be obtained and Idaho Development would have been repaid $800,000. The remaining $300,000 owed would be secured by a new note and deed of trust and be subordinated to the construction loan. Idaho Development only intended to be involved longer if the initial $800,000 was paid in 90 days, otherwise the deed of trust and promissory note indicate they were to be repaid the $1,100,000 at the 90 day mark.

When Idaho Development was not getting paid by the maturity date they negotiated with Teton View to extend the note for one month in exchanged for $10,000. This was agreed to. When Teton View still did not pay, Idaho Development contacted an attorney, sent a demand letter and eventually filed the present suit. Surely someone who truly viewed themselves as a 33.3% owner in a business hoping to make a profit after the subdivision was built would not negotiate with the other partners to try get paid $10,000 to extend the note another month. A true equity owner would have waited to be paid at a later time. This was exactly the opposite in the present case. The fact there was a fixed maturity date on the promissory note and deed of trust and Idaho Devleopment sought to strictly enforce this against the other members of Teton View clearly shows Idaho Development's interest was as a creditor and not an equity holder.

(3) Source of payment

"If repayment is possible only out of corporate earnings, the transaction has the appearance of a contribution of equity capital, but if repayment is not dependent upon earnings, the transaction reflects a loan to the corporation." *Estate of Mixon*, 464 F.2d at 405. The joint venture agreement indicates Idaho Development was going to be paid $800,000 upon the funding of the construction loan. It was not anticipated by Idaho Development that the full $1,100,000 would be repaid out of the earnings of Teton View. As discussed above, the maturity date for

which Idaho Development was owed the full $1,100,000 (amended to $850,000 by the amended deed of trust) was May 28, 2008. When this payment was not made on time and not made after an extension was granted, the amount became due and payable. Therefore, the documents and actions of the parties show the full $1,100,000 (amended to $850,000 by the amended deed of trust) was a loan to the corporation not to be paid from the earnings of the business, but from a construction loan Teton View was going to obtain within three (3) months. If a construction loan was obtained, then Idaho Development would agree to subordinate $300,000, which would be paid from lot sales or the earnings of the business.

(4) the right to enforce payment of principal and interest;

"If there is a definite obligation to repay the advance, the transaction would take on some indicia of a loan." *Estate of Mixon*, 464 F.2d at 405. In *Mixon* a fixed date of repayment was not expressly set forth, however the parties anticipated repayment and "all parties involved did not consider the advance as providing permanent capital financing, which is ordinarily derived from equity advances, but rather working capital to meet what was thought to be, and what proved to be, a temporary emergency." *Id.* at 404-406. As previously shown the promissory note and deed of trust both had a definite obligation to repay at a certain time. Idaho Development sought repayment when payment was not made and Teton View agreed to pay extra if Idaho Development would agree to withhold seeking payment for a month. Since there was a definite obligation to repay, Idaho Development's giving money to Teton View was a loan.

DePatco seeks to rely on the promissory note which indicates that Teton View may enlarge the note to ensure adequate funding for the project and that Idaho Development agrees to leave $500,000 in the project and then subordinate to any third party construction financing. However these statements contradict with other statements within the promissory note which state the entire principal and all accrued interest shall become due and payable if note is called due. The statement DePatco seeks to rely upon also contradicts with the deed of trust which indicates the "making of such further loans, advances or expenditures shall be optional with the Beneficiary." The statement also contradicts the joint venture agreement in which Idaho Development agreed to subordinate $300,000 to the construction loan.

Therefore, Idaho Development had the ability to enforce payment at the date the promissory note and deed of trust matured, so Idaho Developments giving money to Teton View was a loan.

When the Court is trying to determine the interpretation of various documents it must look to the true intent of the parties. The Idaho Supreme Court has stated:

> This Court has frequently held that "where the terms of a contract are ambiguous its interpretation and meaning is a fact question to be determined by the jury." *National Produce Distributors v. Miles and Meyer*, 75 Idaho 460, 465, 274 P.2d 831, 833 (1954). *See also, Big Butte Ranch, Inc. v. Grasmick*, 91 Idaho 6, 415 P.2d 48 (1966); *Molyneux v. Twin Falls Canal Co.*, 54 Idaho 619, 35 P.2d 651 (1934). Extrinsic evidence may be considered by the jury in attempting to arrive at the true intent of the parties. *Big Butte Ranch, Inc. v. Grasmick, supra.* In *Wood River Power Co. v. Arkoosh*, 37 Idaho 348, 215 P. 975 (1923), a case which involved the interpretation of an ambiguous contract, this Court stated:
>
> > "In the construction of a contract, the court will endeavor to arrive at the real intention of the parties, and will consider the facts and circumstances out of which the contract arose and will construe the contract in the light of such facts and circumstances." 37 Idaho at 354, 215 P. at 976.
>
> Thus, we find here that the trial court properly instructed the jury to consider the subject matter and language of the contract, the object and purpose of the contract, the circumstances surrounding the contract and any parol evidence as was heard concerning these issues in its determination of the intention of the parties.

Werry v. Phillips Petroleum Co., 97 Idaho 130, 135-36, 540 P.2d 792 (1975).

When the Court considers the various documents, the circumstances surrounding the transaction, and the intention of the parties it is clear that Idaho Development did not put at risk $1,100,000. Idaho Development was loaning this money to Teton view.

(5) participation in management flowing as a result;

The less control and participation in management Idaho Development had then the more the money looks like a loan. *Estate of Mixon*, 464 F.2d at 406. Idaho Development did meet with Mr. Spafford and Mr. Versteeg to receive updates and did sign some checks, however the day to operations and business was being run by Mr. Spafford and Mr. Versteeg. Mr. Versteeg entered into the agreement with DePatco. Idaho Development had no part in this and did not control or operate the business.

(6) the status of the contribution in relation to regular corporate creditors;

If Idaho Development is subordinate to Teton View's general creditors, a contribution to capital is indicated. *Stinnett's Pontiac Service, Inc.*, 730 F.2d 634, 639 (1984). When Teton View received the money from Idaho Development, Teton View's creditors were ZBS and others who were to be paid from the operating capital. ZBS took a deed of trust on the property and did not look to repayment of this from Idaho Development. ZBS agreed to subordinate its deed of

trust to that of Idaho Development. The other creditors were to be paid in due course and Idaho Development was not subordinated to any of these other creditors. DePatco was not a creditor at the time Teton View was formed. Idaho Development advance of money was therefore not subordinate to Teton View's general creditors.

(7) the intent of the parties;

Intent, at least when the facts are ambiguous, is to be considered in deciding whether to characterize the payment as debt vs equity. *Estate of Mixon*, 464 F.2d at 407. When the objective intent, the outward signs, "are ambiguous and do not result in a clear manifestation of objective intent, then subjective intent is relevant on the issue." *Id.* Melinda Boswell's affidavit states it was her intent to only subordinate $300,000 to a construction loan. She did not anticipate construction would begin until the construction loan was in place. In looking at all the circumstances surrounding the transaction, a signed deed of trust and promissory note with fixed maturity dates and interest payments, and the actions of the parties when the Note and Deeds of Trust were not paid at the maturity date, the Court may reasonably conclude the objective and subjective intent of the parties was that $1,100,000 would be repaid in 90 days unless a construction loan could be obtained at which time $800,000 would be repaid and $300,000 would be subordinated to a construction loan.

(8) "thin" or adequate capitalization;

Undercapitalization or "financial inadequacy is measured by the nature and magnitude of the corporate undertaking or the reasonableness of the cushion for creditors at the time of the *inception* of the corporation." *Pierson v. Jones*, 102 Idaho 82, 84, 625 P.2d 1085 (1981)(italics in original). Idaho Development was intending on getting repaid the full amount it put into Teton View, unless a construction loan was obtained. A portion of this initial amount was put up to pay for day to day operations. These were the only expenses anticipated by Teton View until the construction loan was obtained. Thus Teton View provided a cushion for the foreseeable creditors at the time of the *inception* of the business.

DePatco asserts if Teton View was indebted for $1,100,000 the day after its inception, the "only possible equity that Teton View could claim prior to any lot sales would be the equity that other creditors, such as DePatco, created through improvements to the properties." *Motion for Summary Judgment,* p. 15. While it may be true that Teton View's equity can only increase when improvements are made to the property, this statement misses the fact that Idaho

Development was not anticipating any construction to be done until a construction loan had been obtained and they had been paid back $800,000. Therefore, DePatco chose to begin work without verifying there was working capital available to satisfy the debt Teton View had just agreed to pay. In addition, Idaho Development did not expressly agree to subordinate its claim to DePatco, it agreed to subordinate $300,000 of its claim to a construction loan which was never obtained. Therefore, Idaho Development should not be required to subordinate any of its loan to DePatco.

(9) Identity of interest between creditor and stockholder;

"If advances are made by stockholders in proportion to their respective stock ownership, an equity capital contribution is indicated." *Estate of Mixon*, 464 F.2d at 409. Idaho Development gave $1,100,000 in exchange for a promissory note and deed of trust securing first position. Idaho Development had a 33.3% ownership in Teton View. Rothchild Properties, LLC obtained the other 66.6% ownership interest in Teton View, yet did not put up any capital. It was contemplated Rothdchild would only give their time, labor, and know how to the venture. It is unreasonable to believe Rothchild's time, labor, and know how were anywhere equal to the amount of money Idaho Development put up to purchase the property. A 33.3% "owner would not be inclined to advance funds to [business] without recourse and without requiring the same of their fellows." *See Estate of Mixon*, 464 F.2d at 409. Therefore such "payments bearing absolutely no relation to [Idaho Development's] pro rata ownership clearly are completely inconsistent with characterization of the advance as a capital contribution." *Id.*

(10) Source of interest payments;

"A true lender is concerned with interest." *Estate of Mixon*, 464 F.2d at 409, *quoting Curry v. United States*, 396 F.2d 630 (5th Cir.1968). "The failure to insist on interest payments ordinarily indicates that the payors are not seriously expecting any substantial interest income, but are interested in the future earnings of the corporation or the increased market value of their interest." *Estate of Mixon*, 464 F.2d at 409. Idaho Development received interest payments for March, April, and May of 2008. In addition, when payment was not made at the notes maturity date, Idaho Development, requested $10,000 in order to extend payment for one month. When some money did come to Teton View, Idaho Development demanded payments of all unpaid interest and an interest reserve for future payments until it was anticipated that Teton View would have a construction loan. Idaho Development was very concerned with interest.

Therefore, Idaho Development's first concern was as a lender to receive interest and $800,000 repaid and then receive some of the earnings, as lot are sold. Idaho Development's advance to Teton View was a debt, not a capital contribution.

(11) The ability of the corporation to obtain loans from outside lending institutions;

"The purpose of this inquiry is obviously to test whether the shareholder contributors acted I the same manner toward their corporation as ordinary reasonable creditors would have acted. If no reasonable creditor would have loaned funds to the corporation at the time of the advance, an inference arises that a reasonable shareholder would likewise not so act." *Estate of Mixon*, 464 F.2d at 410. Ms. Boswell did not have any prior experience in real estate construction, joint ventures, or loaning money. She had just inherited this large amount of money just two (2) months previous to this transaction. She had only known Mr. Spafford and Mr. Versteeg just about a month. She trusted these individuals and their representations that a construction loan could be obtained. The construction industry took a very hard hit in the fall of 2008 and lenders have been very reluctant to lend since this time. Just because Teton View was not able to obtain a loan from outside lending institutions does not remove the fact it may have been possible had Mr. Spafford and Mr. Versteeg not had DePatco begin work prior to obtaining a construction loan. Mr. Clark was in contact with at least one lender who would not proceed forward without further information which Mr. Clark had difficulty obtaining from Mr. Spafford and Mr. Versteeg. In light of the significant other factors, which favor a finding of a debt, the fact Teton View did not obtain a loan from outside lending institutions should not preclude the Court from finding Idaho Development's advancement was a debt.

(12) The extent to which the advance was used to acquire capital assets; and

If the expenses were used to meet the daily operating needs, then this shows a debt. *Estate of Mixon*, 464 F.2d at 410. If the expenses were used to purchase capital assets, this is more like a capital contribution. *Id.* While the money advanced by Idaho Development was used to purchase capital assets, it was secured by a promissory note and deed of trust with a fixed maturity date. The joint venture contemplated repayment of $800,000 when a construction loan was obtained. Therefore the parties understood the money was to buy a capital asset (land), but they also understood the majority of the money would be repaid in a very short time frame. This is only one factor which the Court must consider and when viewed in light of all the other factors should not convince the Court to treat Idaho Developments advance as a capital contribution. In

Nerox Power Systems, Inc. v. M-B Contracting Co., Inc., 54 P.3d 791 (Alaska 2002) it was determined "those who provided money to Nerox Power for the [purchase of the] coal mine simply made a bad investment." *Id.* at 800. The beneficiaries of the deed of trust had received preferred shares for their investments. *Id.* at 799. It appears the money was given by the investors around October 1995, Nerox leased equipment from M-B Contracting in September 1996, Nerox then filed a deed of trust in April 21, 1997 simply because the management decided it would be appropriate that the investors have security for the payment of the debts they were owed. *Id.* at 792-800. In addition, when the deeds of trust were signed the corporations were grossly undercapitalized. *Id.*

Unlike the investors in the *Nerox* case who did not get a deed of trust or promissory note with an interest payment and a fixed maturity date, Idaho Development received both of these documents at the time they advanced money to Teton View. Idaho Development's deed of trust was recorded at a time when priorities between Teton View's creditors was clear and was not done when the company was grossly undercapitalized as a way to fraudulently defraud other creditors. Idaho Development was not attempting in any way to defraud current or anticipated potential creditors of Teton View. Our case is not a situation in which someone just ascended to the head of a company and sought to place its own debts on the same level or above other creditors and thus take unfair advantage in raiding the assets. *Id.* at FN 22. Idaho Development's promissory notes and deed of trust was in place long before DePatco ever came on the picture and started work. As the *Nerox* Court points out in footnote 22, a director may become a secured creditor by making "good faith loans to their own corporation to repay their secured debt ahead of unsecured creditors." *Id.* Idaho Development made a good faith loan to Teton View and took the necessary steps to secure this loan.

(13) The failure of the debtor to repay on the due date or to seek a postponement.

When payment is repaid on the due date or the debtor seeks a postponement, this is indicative the advancement is a loan. *Estate of Mixon*, 464 F.2d at 410. Teton View, the debtor, did not repay the debt on the due date and when Idaho Development called the debt due, Teton View asked for a one month postponement. This is evidence of a loan.

The *Hedged-Investments* Court determined that most, but not all of the factors, weighed in favor of a debt. Therefore, recharacterization was not appropriate. *Hedged-Investments*, 380 F.3d at 1299. The *Estate of Mixon* Court determined that in spite of the fact that all the usual

indicia of a legitimate indebtedness did not exist, it was clear the intent was for temporary cash advances to be repaid in a reasonably determinable time period. *Estate of Mixon*, 464 F.2d at 410. After analyzing the above factors, the *Stinnett's* Court determined the advances were contributions to capital and not a bona fide debt based upon the facts that there was no specific repayment, the alleged creditor did not request the loan to be repaid, the notes were unsecured and subordinate to other general creditors. *Stinnett's*, 730 F.2d at 640.

Similar to both *Hedged-Investments* and *Estate of Mixon*, when the Court reviews the above factors it will find that most (factors 1-10 and 13) point to the fact Idaho Developments advancement to Teton View was a debt and not a capital investment. The two factors, #11 and #12, which point to a capital contribution have reasonable explanation and do not provide sufficient justification for recharacterization, just as the *Hedged-Investments* and *Estate of Mixon* Courts did not find recharacterization appropriate even though not all of the factors were totally in favor of a debt. In addition, the present case is factually different than *Stinnett's* were the court did allow a recharacterization. In the present case, there was a specific repayment date, Idaho Development requested repayment immediately upon the due date of the notes, the notes were secured by a properly recorded deed of trust, and other creditors at the time the money was given were subordinate to Idaho Development. When all the documents, along with the actions of the parties, are taken together, the true substance of this transaction is that of a loan, not of a capital contribution or investment as stated in the joint venture agreement. Therefore the Court should properly characterize this transaction as a loan and rule that Idaho Development has priority over DePatco to the amount of $850,000.00, as recorded on its amended deed of trust.

CONCLUSION

The true label and substance of the transaction between Idaho Development and Teton View is that of a loan under Idaho law and the law of other jurisdictions. Idaho Development received a promissory note for the full amount given, which contained an interest rate and a specific maturity date. A deed of trust was executed and recorded in favor of Idaho Development. DePatco did not obtain a subordination of this deed of trust prior to beginning construction. Therefore, Idaho Development's loan to Teton View should not be recharacterized as a capital contribution to Teton View or equitably subordinated to DePatco's lien.

DATED this 25th day of January, 2010.

Alan R. Harrison

Alan R. Harrison

NOTICE OF SERVICE

I certify that on this day I served a true and correct copy of the foregoing document in accordance with Rule 5(b) of the Idaho Rules of Civil Procedure on the following by the method of service indicated:

Mark R. Fuller (DePatco) 410 Memorial Drive, Suite 201 PO Box 50935 Idaho Falls, ID 83405-0935	( ) Mailing, postage pre-paid ( ) Fax 208-524-7167 (✓) Courthouse Box ( ) Hand Delivery
Karl R. Decker (ZBS) Holden, Kidwell, Hahn & Crapo, PLLC PO Box 50130 1000 Riverwalk Drive, Suite 200 Idaho Falls, ID 83405	( ) Mailing, postage pre-paid ( ) Fax 208-523-9518 (✓) Courthouse Box
Jeffrey D. Brunson (Schiess) Beard St. Clair Gaffney, PA 2105 Coronado Street Idaho Falls, ID 83404-7495	( ) Mailing, postage pre-paid ( ) Fax 208-529-9732 (✓) Courthouse Box
Kipp Manwaring (MacArthur) PO Box 50271 Idaho Falls, ID 83405-0271	( ) Mailing, postage pre-paid (✓) Fax 208-523-9146 - email ( ) Hand Delivery
Rick Hajek (Amerititle) 1650 Elk Creek Idaho Falls, ID 83404	(✓) Mailing, postage pre-paid ( ) Fax
Richard Mollerup, Esq. MUELEMAN MOLLERUP 755 W. Front Street, Ste. 200 Boise, ID 83702	(✓) Mailing, postage pre-paid ( ) Fax 208-336-9712

ARH Date 1-25-10

Alan R. Harrison
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497 N. Capital Ave, Suite 210
Idaho Falls, Idaho 83402
Telephone: (208) 552-1165
Fax: (208) 552-1176
(ISB#: 6589)

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

IDAHO DEVELOPMENT, LLC, a Utah limited liability company, Plaintiff, vs. TETON VIEW GOLF ESTATES, LLC, a Utah limited liability company; ROTHCHILD PROPERTIES, LLC, a Utah limited liability company; WESTERN EQUITY, LLC, a Utah limited liability company; AMERITITLE COMPANY; ZBS, LLC, an Idaho limited liability company; DEPATCO, INC., an Idaho Corporation; SCHIESS & ASSOCIATES, P.C., an Idaho Professional Service Corporation; HD SUPPLY WATERWORKS, LTD.; DOES 1-3, and ALL PERSONS IN POSSESSION OF REAL PROPERTY DESCRIBED HEREIN, Defendants.	Case No. CV-08-4395 **AFFIDAVIT OF DAVID CLARK**

STATE OF UTAH)
) ss.
County of _____)

I, David Clark, being first duly sworn, states:

1) I am a friend of Melinda Boswell, the manager of Idaho Development, LLC, who is the Plaintiff in the above case. I am over eighteen years of age and am competent to testify in this matter. I make the following statements from personal knowledge. If called as a witness in open court, I would testify in accordance with the statements set out.

2) I met Melinda Boswell in the middle of January 2008. I introduced her to Lynn Spafford. I had done business with Mr. Spafford before. Mr. Spafford indicated if Ms. Boswell loaned Mr. Spafford money to purchase some land in Idaho, she would be paid interest and receive her money back within three (3) months. Later Mr. Spafford indicated if Ms. Boswell could make more money if she subordinated $300,000 of the money she was giving and partner up with them.

3) Mr. Spafford and Mr. Versteeg told Ms. Boswell and myself several times they a construction loan to fund the project, however they were unable to obtain a construction loan.

4) Prior to May 28, 2008, the maturity date for the promissory note and deed of trust, Ms. Boswell and I contacted Mr. Spafford and Mr. Versteeg and indicated the money was coming due. They asked if the Note could be extended to the end of June 2008. I talked with Ms. Boswell and she agreed to extend the due date if Teton View agreed to pay $10,000 for this extension. They agreed to this on behalf of Teton View.

5) Sometime in June 2008, Mr. Spafford asked me to see if I could try to find funding for the project.

6) At some point after the extension was granted, Teton View, through Mr. Versteeg as manager, signed a Bid Proposal from DePatco, Inc. to provide the water, sewer, and road system for the project. I was not involved in any way contacting or seeking to have DePatco start work on the project.

7) I was told in June 2008 by Mr. Spafford that DePatco had agreed to subordinate the first $500,000 of their work to a construction loan. I was trying to find funding for the project. At least one of the lenders was wanting to have DePatco's position in writing. Ms. Boswell and I asked Mr. Spafford several times for permission to contact DePatco to get in

writing that DePatco was willing to subordinate the first $500,000 of their work to a construction loan. Mr. Spafford denied these requests. He said he was working out the terms with DePatco and not to contact them.

8) My first contact with DePatco was on July 18th or 19th of 2008. I called Greg Stoddard at DePatco to confirm they were willing to subordinate the first $500,000 of their work to a construction loan. Mr. Stoddard indicated he had not agreed to this. He indicated he would be sending out an invoice shortly. I told Mr. Stoddard that Teton View did not have a construction loan in place.

9) I had been talking with several lenders and was making progress on getting a loan, however I was not able to provide all the information the lenders needed due to Mr. Spafford and Mr. Versteeg not allowing us to talk to DePatco. The lenders were positive about loaning, but I did not get a firm commitment from them due to the above difficulties. Therefore I cannot testify for sure whether the lenders would have actually given a loan or not.

10) I have been unable to obtain a loan at the present time due to the amount of liens on the property and the inability to go to a lender with a clear picture of how these liens will be handled by the various lien claimants.

Dated this 25th day of January, 2010.

David Clark

Subscribed and sworn to before me on this 25 day of January, 2010.

JENNIFER RAYE FREEMAN
Notary Public
State of Utah
My Comm. Expires Jul 1, 2011
2984 Dogwood Cir Saint George UT 84790-6907

Jennifer Raye Freeman
Notary Public for Utah
Residing at: 2984 Dogwood Cir. St. George UT 84790
My Commission Expires: 7/1/11

Alan R. Harrison
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497 N. Capital Ave, Suite 210
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(ISB#: 6589)

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

IDAHO DEVELOPMENT, LLC, a Utah limited liability company, Plaintiff, vs. TETON VIEW GOLF ESTATES, LLC, a Utah limited liability company; ROTHCHILD PROPERTIES, LLC, a Utah limited liability company; WESTERN EQUITY, LLC, a Utah limited liability company; AMERITITLE COMPANY; ZBS, LLC, an Idaho limited liability company; DEPATCO, INC., an Idaho Corporation; SCHIESS & ASSOCIATES, P.C., an Idaho Professional Service Corporation; HD SUPPLY WATERWORKS, LTD.; DOES 1-3, and ALL PERSONS IN POSSESSION OF REAL PROPERTY DESCRIBED HEREIN, Defendants.	Case No. CV-08-4395 **AFFIDAVIT OF MELINDA BOSWELL**

STATE OF UTAH)
) ss.
County of _____)

I, Melinda Boswell, being first duly sworn, states:

1) I am the manager of Idaho Development, LLC who is the Plaintiff in the above case. I am over eighteen years of age and am competent to testify in this matter. I make the following statements from personal knowledge. If called as a witness in open court, I would testify in accordance with the statements set out.

2) My father died in December 2007. I inherited over a million dollars in his IRA. I met David Clark for the first time around the middle of January 2008. We started to hang out. After meeting Mr. Clark, I spent one week in Mexico and also 10 days in Hawaii. I returned home from Hawaii on February 19, 2008. After meeting Mr. Clark, he introduced me to Lynn Spafford and indicated he had done business with Mr. Spafford before. I was told if I loaned Mr. Spafford money to purchase some land in Idaho, I would be paid interest and receive my money back within three (3) months. It seemed like a good return on my money. During this time, Mr. Spafford said I could make more money than just interest if I would subordinate $300,000 of the money I was giving and partner up. I was told I would receive a promissory note and deed of trust which would ensure I had first position on the land. I trusted Mr. Clark and Mr. Spafford, both of whom I had just met within the previous month and a half, and agreed to do this without consulting any legal counsel.

3) I did not prepare any of the documents concerning the formation of Idaho Development, Teton View, the Joint Venture Agreement, Escrow Instructions[1], Deeds of Trust, the Promissory Note. It is my understanding that these were prepared by Mr. Spafford. When I signed the Joint Venture Agreement I intended to only subordinate $300,000 to the construction loan. When the type written joint venture agreement stated I would be repaid $800,000 and would subordinate $500,000, I noticed these two numbers did not add up to the $1,100,000, which I had agreed to loan to Teton View. As the Joint Venture Agreement shows, I crossed out the $500,000 and handwrote in $300,000 above it. I initialed the change as well as Mr. Versteeg. This evidenced my true intent in giving the money, I would only subordinate $300,000 upon the funding of the construction loan.

[1] Attached to this Affidavit as Exhibit A.

4) I was to be repaid the $800,000 within 90 days after signing the joint venture agreement. Therefore, I was to be repaid by May 28, 2008. This date is shown on the promissory note and first deed of trust. I never intended, nor was it the intent of the parties, that I risk the whole $1,100,000 as a capital contribution not subject to some repayment. The true substance of the transaction was I would loan $1,100,000.00 to buy the property. When a construction loan was obtained then I would receive $800,000 and would subordinate the remaining $300,000 to the construction loan. I was to receive another deed of trust and promissory note securing the amount I was subordinating. I would only subordinate if construction financing was obtained by May 28, 2008. Since funding was not obtained by May 28, 2008, I should have been owed $1,100,000.

5) The 33.3% interest in Teton View was supposed to be kind of an added bonus for partnering up and agreeing to subordinate some of the money to the construction loan. The 33.3% interest in Teton View was not to be considered an exchange for the money I gave to Teton View.

6) I also signed the Articles of Organization for Teton View. The promissory note indicates Idaho Development would agree to leave $500,000 in the project and subordinate to any third party construction financing. It is my understanding that $500,000 was a misprint just as the $500,000 in the joint venture agreement was a misprint. I had never agreed, nor was it ever discussed between Teton View or myself that I would subordinate $500,000. I do not recall ever seeing the promissory before it was signed by Mr. Versteeg.

7) My understanding was the Promissory Note would be consistent with the Joint Venture Agreement which stated I would be repaid $800,000 upon the funding of the construction loan and would subordinate $300,000 to the construction loan. I never intended, nor was there any discuss at the formation of the Joint Venture, that I would fund the project to completion or subordinate to any other financing other than a construction loan which had first repaid me $800,000. In not closely reviewing the Promissory Note and Escrow Instructions, I once again trusted Mr. Spafford and Mr. Versteeg that the Promissory Note and Deed of Trust would insure I had the first position on the property and would receive at least $800,000 within 90 days.

8) I had no prior experience in real estate construction, joint ventures, or loaning money.

9) I did not give the money to Teton View and obtain a promissory note and deed of trust in order to defraud current or future potential creditors. I gave the money in good faith expecting to be repaid in a short amount of time. After the formation of Teton View, a checking account was opened with around $100,000 in the account for operating expenses. This was sufficient money to take care of current creditors. I did not anticipate any other creditors coming on the project until after the construction loan was obtained.

10) Mr. Spafford and Mr. Versteeg were governing the day to day affairs of Teton View and would report to me they had various loans in the works. They would indicate what bills needed to be paid and I signed some of the checks to pay these bills.

11) At the beginning of March 2008, Teton View presented me with an Amended Deed of Trust reducing the amount of the deed of trust to $850,000. I was told I needed to sign this amendment in order for the project to move forward. I did not understand why I was signing it, but trusted Mr. Spafford and Mr. Versteeg knew what they were doing. I signed the Amended deed of Trust without getting any security for the remaining $250,000 I was owed.

12) Teton View never approached me about paying the $400,000 due to ZBS on April 15, 2008 pursuant to ZBS promissory note.

13) Mr. Spafford and Mr. Versteeg told Mr. Clark and myself several times they had the potential for a construction loan to fund the project. One time, Mr. Versteeg indicated he was in a closing on this project right then and could not talk.

14) Prior to May 28, 2008, the maturity date for my promissory note and deed of trust, Mr. Clark and I contacted Mr. Spafford and Mr. Versteeg and indicated the money was coming due. They asked if I would extend the due date on the Note to the end of June 2008. I agreed to do this as long as Teton View paid me $10,000 for this extension. They agreed to this on behalf of Teton View.

15) At some point after I granted the extension, Teton View, through Mr. Versteeg as manager, signed a Bid Proposal from DePatco, Inc. to provide the water, sewer, and road system for the project. I was not involved in any way contacting or seeking to have DePatco start work on the project. I did not agree in any meeting to subordinate my deed of trust to DePatco.

16) I was told in June 2008, by Mr. Spafford that DePatco had agreed to subordinate the first $500,000 of their work to a construction loan. Since Mr. Spafford and Mr. Versteeg had asked Mr. Clark to try to find funding, I needed to get DePatco's position in writing for the

lenders. I asked Mr. Spafford several times for permission to contact DePatco to get in writing that DePatco was willing to subordinate the first $500,000 of their work to a construction loan. Mr. Spafford denied these requests. He said he was working out the terms with DePatco and not to contact them.

17) Teton View did not have funding at the end of June as agreed. At the end of June, I directed my attorney to send a letter to collect the full amount I was owed, $1,100,000 plus unpaid interest and attorney's fees. I had been paid interest for March, April, and May. Teton View did not make any contact with me, so I directed my attorney to file a lawsuit to collect the amount I was owed.

18) During this time I had no contact with DePatco, nor did anyone from DePatco try to contact me. I never agreed in any way to subordinate any amount of money I had given to Teton View to DePatco. I never indicated to anyone I would subordinate my deeds of trust without first being paid $800,000 as the joint Venture Agreement states. I was aware Mr. Clark contacted DePatco around July 18th or 19th of 2008, to confirm that DePatco was willing to subordinate the first $500,000 of their work to a construction loan.

19) The current lawsuit was filed on July 22, 2008 to foreclose on my Deed of Trust and to collect on the Promissory Note.

Dated this 25th day of January, 2010.

Melinda Boswell

Melinda Boswell

Subscribed and sworn to before me on this 25 day of January, 2010.

JENNIFER RAYE FREEMAN
Notary Public
State of Utah
My Comm. Expires Jul 1, 2011
2984 Dogwood Cir Saint George UT 84790-6907

Notary Public for Utah
Residing at: 2984 Dogwood Cir. St. George UT 84790
My Commission Expires: 7/1/2011

MELINDA BOSWELL
IDAHO DEVELOPMENT, LLC
2192 Preston Street
SALT LAKE CITY, UTAH 84106

February 29, 2008

Amended Escrow Instruction

To: Mary Bruggenkamp, Escrow Officer
Alliance Title & Escrow
1070 Riverwalk Drive
Idaho Falls, ID 83402

From: Idaho Development, LLC,
Attn: Melinda Boswell

Sent via facsimile

Re: Borrower: Teton View Golf Estates, LLC
Address: 6371 N. 5th S., Idaho Falls, ID
Tax Serial # RP03N38E31

YOU ARE DIRECTED AS FOLLOWS:

1. Upon receipt of the sum of $100,000, anticipated to occur on or before February 29, 2008 you are directed to hold the sum of $50,000 for Ameri-Title, (208) 524-6600, Attn: Jeannee Nangle, to be held for closing on behalf of seller, Zundel. The remaining sum of $50,000 shall be wired to KeyBank, under the account title, Rothchild Properties, LLC. Wiring Instructions shall be separately provided.

2. Prepare a closing statement, Trust Deed, and Trust Note. Please label "commercial loan". The note shall bear interest at 6% on a 30 year amortization with a 90 day call provision, at which time the entire unpaid balance, including interest, if called is payable in full. Payment should be mailed to the above indicated address.

3. The borrower shall pay all closing costs in regard to this financing, except as otherwise provided in the RepC.

4. Indicate 6 origination points on the gross loan amount. Of this amount, 3 origination points shall be paid to Melinda Boswell; 1.5 origination points shall be payable to David C. Clark ; and 1.5 origination points shall be payable to St. Charles Group, Inc.

EXHIBIT A

5. Issue a lender's title policy insuring Idaho Development, LLC and assigns for the principal loan amount in the net loan amount of $1,100,000. in addition to Closing Costs, against a First Deed of Trust position on the above referenced real property in Idaho Falls, Utah, known as tax serial # RP03N38E310048. Beneficiary shall be Idaho Development, LLC; Trustor shall be Teton View Golf Estates, LLC; and Trustee shall be Alliance Title & Escrow.

6. Prepare a Trust Note, which shall allow payment to Idaho Development, LLC of 15% net proceeds from each lot sale. In addition, in the event that the Note is not satisfied within the 90 day term, at borrower's option, it may enlarge the Note with Idaho Development, LLC, to ensure adequate funding for completion of the project. At a minimum, at borrower's option, Idaho Development agrees to leave the sum of $300,000 in the project and to then subordinate to any third party construction financing.

7. Upon receipt of the additional wire of $1,000,000, anticipated to occur on or before February 29, 2008, and after recording the First Deed of Trust, you are directed to release the sum of $800,000 to Ameri-Title, Attn: Jeannee Nangle, to be released to her insured seller Zundel, upon receipt of a special warranty deed from Zundel in favor of Teton View Golf Estates, LLC. The remaining balance shall be released to Teton View Golf Estates, LLC, pursuant to wiring instructions to be separately provided.

8. The Trust Note shall have an additional release provision, allowing unencumbered conveyance of the 4.19 acres of commercial land to Teton View Golf Estates, LLC, upon the disbursement of the $800,000 payment to the seller, Zundel.

Idaho Development, LLC,

_____

Melinda Boswell, Manager

ACCEPTANCE OF ESCROW INSTUCTION

I, Mary Bruggenkamp, acting as authorized agent for Alliance Title & Escrow, by my signature hereto, hereby accept the terms and conditions of the foregoing instruction and agree to follow and comply with the same.

_____

Mary Bruggenkamp, Escrow Officer
Alliance Title & Escrow

Karl R. Decker, ISB #3390
Holden, Kidwell, Hahn & Crapo, P.L.L.C.
1000 Riverwalk Drive, Suite 200
P.O. Box 50130
Idaho Falls, ID 83405
Telephone 208-523-0620
Facsimile 208-523-9518

Attorneys for ZBS, LLC, Brad Zundel, and Jim Zundel

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

IDAHO DEVELOPMENT, LLC, a Utah limited liability company,

Plaintiff,

vs.

TETON VIEW GOLF ESTATES, LLC, a Utah limited liability company; ROTHCHILD PROPERTIES, LLC, a Utah limited liability company; WESTERN EQUITY, LLC, a Utah limited liability company; AMERITITLE COMPANY; ZBS, LLC, an Idaho limited liability company; DEPATCO, INC., an Idaho Corporation; SCHIESS & ASSOCIATES, P.C., an Idaho Professional Services Corporation; HD SUPPLY WATERWORKS, LTD; DOES 1-3 and ALL PERSONS IN POSSESSION OF REAL PROPERTY DESCRIBED HEREIN,

Defendants.

Case No. CV-2008-4395

ZBS, LLC'S RESPONSE TO DEPATCO, INC'S MOTION FOR SUMMARY JUDGMENT

ZBS, LLC, an Idaho limited liability company,

Counterclaimant/cross-claimant/third-party plaintiff

vs.

IDAHO DEVELOPMENT, LLC, a Utah limited liability company

Counter-defendant,

TETON VIEW GOLF ESTATES, LLC, a Utah limited liability company;
AMERITITLE COMPANY;
DEPATCO, INC., an Idaho Corporation;
SCHIESS & ASSOCIATES, P.C., an Idaho Professional Services Corporation;
HD SUPPLY WATERWORKS, LTD;

Cross-defendants,

ALLIANCE TITLE & ESCROW CORP., an Idaho corporation, as and only as trustee,
IDAHO TITLE & TRUST, INC., as and only as trustee,
DOES 1-20;

Third-party defendants.

COMES NOW defendant/counterclaimant ZBS, LLC, (hereafter "ZBS") by and through counsel of record, and pursuant to Idaho Rule of Civil Procedure 56 responds to and answers the Motion for Partial Summary Judgment Re: Plaintiff's Secured Claim Priority of defendant/counterclaimant DePatco, Inc., (hereafter the "Motion") as follows: ZBS joins in the motion and argument to the extent that Idaho Development,

LLC's loan or loans to Teton View Golf Estates, LLC should be recharacterized as a capital contribution in Teton View Golf Estates, and/or that such loan or loans and the associated real property liens should be subordinated to the claims of ZBS. The facts and authorities cited by DePatco apply equally to ZBS.

ZBS understands, acknowledges, and alleges that the Motion does not address the lien priority rights of DePatco, Schiess and Associates, and ZBS with respect to such parties claims of priority against each other. ZBS specifically alleges that Schiess and Associates has not properly placed at issue the priority of its claim with respect to ZBS and DePatco by filing its joining response to the Motion, and ZBS hereby specifically reserves its right to respond to such lien priority issues as may be advanced by Schiess and Associates if and when they are properly brought before the court by motion directed to such matters.

DATED this 25th day of January, 2010.

Karl R. Decker
Holden, Kidwell, Hahn & Crapo, P.L.L.C.,
attorneys for defendant ZBS, LLC

G:\WPDATA\KRD\15389, ZBS LLC\03 Pleadings\DePatco MSJ, Response 2010-01-25.wpd

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, with my office in Idaho Falls, Idaho, and that on January 25, 2010, I served a true and correct copy of the foregoing document on the persons listed below by first class mail, with the correct postage thereon, or by causing the same to be delivered in accordance with Rule 5(b), I.R.C.P.

Persons Served:

Alan R. Harrison [X] Mail [ ] Hand [ ] Fax
ALAN R. HARRISON LAW, PLLC
497 N. Capital Avenue, Suite 210
Idaho Falls ID 83402

Jeffrey D. Brunson [X] Mail [ ] Hand [ ] Fax
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(ISB#: 6589)

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

IDAHO DEVELOPMENT, LLC, a Utah limited liability company,

Plaintiff,

vs.

TETON VIEW GOLF ESTATES, LLC, a Utah limited liability company; ROTHCHILD PROPERTIES, LLC, a Utah limited liability company; WESTERN EQUITY, LLC, a Utah limited liability company; AMERITITLE COMPANY; ZBS, LLC, an Idaho limited liability company; DEPATCO, INC., an Idaho Corporation; SCHIESS & ASSOCIATES, P.C., an Idaho Professional Service Corporation; HD SUPPLY WATERWORKS, LTD.; DOES 1-3, and ALL PERSONS IN POSSESSION OF REAL PROPERTY DESCRIBED HEREIN,

Defendants.

Case No. CV-08-4395

PLAINTIFF'S RESPONSE TO ZBS AND SCHIESS'S RESPONSES TO DEPATCO'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Schiess & Associates, P.C. and ZBS, LLC have submitted responses to DePatco's Motion for Partial Summary Judgment in which they have asserted Idaho Development's loan should be subordinated to both of their claims based upon the same principles set forth by DePatco. Idaho Development maintains that neither of the above parties has properly placed at issue the priority of their claims over Idaho Development's deeds of trust. Idaho Development reserves the right to respond to such lien priority issues as may be advanced by either upon proper motion to the Court.

Idaho Development recognizes its priority over Schiess will depend in part on when Schiess started work on the property and what payments had been made on the work done.

Idaho Development maintains it has priority over ZBS because ZBS agreed to subordinate to Idaho Development's when the property was sold. Idaho Development obtained a loan policy of title insurance which indicates in Schedule B, Part II that the "Company insures against loss or damage sustained in the event that they are not subordinate to the lien of the Insured Mortgage." ZBS's deed of trust for $640,000 is listed below this above statement. Thus when Idaho Development gave money to Teton View, ZBS was intending to subordinate its lien to that of Idaho Development. A copy of the Loan Policy of Title Insurance received from Alliance Title is attached as Exhibit D to the Second Affidavit of Plaintiff's Counsel in Support of Opposition to DePatco's Motion for Partial Summary Judgment. Idaho Development is also in the process of obtaining from Amerititle the documents concerning the closing of this deal. Idaho Development anticipates this will have the purchase and sale agreement along with the subordination agreement showing ZBS subordinated its lien to Idaho Development.

DePatco is asserting priority over Idaho Development based upon certain statements in the joint venture agreement and promissory note concerning a construction loan and third party

financing. There was never any agreement between DePatco and Idaho Development, whereas ZBS agreed to subordinate its loan to that of Idaho Development.

Idaho Development has not presented facts and evidence to support its claim over ZBS because this motion has not been properly brought before this Court. Therefore, in the present Motion for Partial Summary Judgment filed by DePatco, Idaho Development respectfully asks the Court to deal with whether DePatco may maintain priority over Idaho Development, keeping in mind that Idaho Development asserts priority over ZBS since ZBS had agreed to subordinate to Idaho Development. At the present time, the Court doesn't have argument before it as to whether DePatco will try to maintain priority over ZBS.

DATED this 29th day of January, 2010.

Alan R. Harrison

Alan R. Harrison

NOTICE OF SERVICE

I certify that on this day I served a true and correct copy of the foregoing document in accordance with Rule 5(b) of the Idaho Rules of Civil Procedure on the following by the method of service indicated:

Mark R. Fuller (DePatco) 410 Memorial Drive, Suite 201 PO Box 50935 Idaho Falls, ID 83405-0935	( ) Mailing, postage pre-paid ( ) Fax 208-524-7167 ( ) Courthouse Box (~~-~~) Hand Delivery
Karl R. Decker (ZBS) Holden, Kidwell, Hahn & Crapo, PLLC PO Box 50130 1000 Riverwalk Drive, Suite 200 Idaho Falls, ID 83405	( ) Mailing, postage pre-paid ( ) Fax 208-523-9518 (✓) Courthouse Box
Jeffrey D. Brunson (Schiess) Beard St. Clair Gaffney, PA 2105 Coronado Street Idaho Falls, ID 83404-7495	( ) Mailing, postage pre-paid ( ) Fax 208-529-9732 (✓) Courthouse Box
Rick Hajek (Ameritite) 1650 Elk Creek Idaho Falls, ID 83404	(~~-~~) Mailing, postage pre-paid ( ) Fax

ARH

Date 1-29-10

Alan R. Harrison
ALAN R. HARRISON LAW, PLLC
497 N. Capital Ave, Suite 210
Idaho Falls, Idaho 83402
Telephone: (208) 552-1165
Fax: (208) 552-1176
(ISB#: 6589)

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

IDAHO DEVELOPMENT, LLC, a Utah limited liability company, Plaintiff, vs. TETON VIEW GOLF ESTATES, LLC, a Utah limited liability company; ROTHCHILD PROPERTIES, LLC, a Utah limited liability company; WESTERN EQUITY, LLC, a Utah limited liability company; AMERITITLE COMPANY; ZBS, LLC, an Idaho limited liability company; DEPATCO, INC., an Idaho Corporation; SCHIESS & ASSOCIATES, P.C., an Idaho Professional Service Corporation; HD SUPPLY WATERWORKS, LTD,; DOES 1-3, and ALL PERSONS IN POSSESSION OF REAL PROPERTY DESCRIBED HEREIN, Defendants.	Case No. CV-08-4395 **SECOND AFFIDAVIT OF PLAINTIFF'S COUNSEL IN SUPPORT OF OPPOSITION TO DEPATCO'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

STATE OF IDAHO)
) ss.
County of Bonneville)

571

Alan R. Harrison, being first duly sworn under oath, deposes and states as follows:

1. I am the attorney for the Plaintiff in the above-entitled action, and make this Affidavit to comply with Rule 55 of the Idaho Rules of Civil Procedure.

2. Attached as Exhibit D is a true and correct copy of the Loan Policy of Title Insurance from Alliance Title for Idaho Development's loan to Teton View.

DATED this 29th day of January, 2010.

Alan R. Harrison
Attorney for Plaintiff

SUBSCRIBED AND SWORN TO before me this 29 day of January, 2010.

(Seal) DEBORAH C. TAYLOR
Notary Public
State of Idaho

Notary Public for Idaho
Residing at: Idaho Falls
My Commission Expires: 12.4.2015

NOTICE OF SERVICE

I certify that on this day I served a true and correct copy of the foregoing document in accordance with Rule 5(b) of the Idaho Rules of Civil Procedure on the following by the method of service indicated:

Mark R. Fuller (DePatco) 410 Memorial Drive, Suite 201 PO Box 50935 Idaho Falls, ID 83405-0935	( ) Mailing, postage pre-paid ( ) Fax 208-524-7167 ( ) Courthouse Box (✓) Hand Delivery
Karl R. Decker (ZBS) Holden, Kidwell, Hahn & Crapo, PLLC PO Box 50130 1000 Riverwalk Drive, Suite 200 Idaho Falls, ID 83405	( ) Mailing, postage pre-paid ( ) Fax 208-523-9518 (✓) Courthouse Box
Jeffrey D. Brunson (Schiess) Beard St. Clair Gaffney, PA 2105 Coronado Street Idaho Falls, ID 83404-7495	( ) Mailing, postage pre-paid ( ) Fax 208-529-9732 (✓) Courthouse Box
Rick Hajek (Ameritite) 1650 Elk Creek Idaho Falls, ID 83404	(✓) Mailing, postage pre-paid ( ) Fax

ARH

Date 1-29-10

Chicago Title Insurance Company

POLICY NO.: ID2021-46-3030818277LAC-2008.72307-75428032

LOAN POLICY OF TITLE INSURANCE

Issued by

Chicago Title Insurance Company

Any notice of claim and any other notice or statement in writing required to be given to the Company under this Policy must be given to the Company at the address shown in Section 17 of the Conditions.

COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, CHICAGO TITLE INSURANCE COMPANY, a Nebraska corporation (the "Company") insures as of Date of Policy and, to the extent stated in Covered Risks 11, 13, and 14, after Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

1. *Title being vested other than as stated in Schedule A.*
2. *Any defect in or lien or encumbrance on the Title. This Covered Risk includes but is not limited to insurance against loss from*
   - *(a) A defect in the Title caused by*
     - *(i) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;*
     - *(ii) failure of any person or Entity to have authorized a transfer or conveyance;*
     - *(iii) a document affecting Title not properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered;*
     - *(iv) failure to perform those acts necessary to create a document by electronic means authorized by law;*
     - *(v) a document executed under a falsified, expired, or otherwise invalid power of attorney;*
     - *(vi) a document not properly filed, recorded, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or*
     - *(vii) a defective judicial or administrative proceeding.*
   - *(b) The lien of real estate taxes or assessments imposed on the Title by a governmental authority due or payable, but unpaid.*
   - *(c) Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land. The term "encroachment" includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land.*
3. *Unmarketable Title.*
4. *No right of access to and from the Land.*
5. *The violation or enforcement of any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to*
   - *(a) the occupancy, use, or enjoyment of the Land;*
   - *(b) the character, dimensions, or location of any improvement erected on the Land;*
   - *(c) the subdivision of land; or*
   - *(d) environmental protection*

   if a notice, describing any part of the Land, is recorded in the Public Records setting forth the violation or intention to enforce, but only to the extent of the violation or enforcement referred to in that notice.
6. *An enforcement action based on the exercise of a governmental police power not covered by Covered Risk 5 if a notice of the enforcement action, describing any part of the Land, is recorded in the Public Records, but only to the extent of the enforcement referred to in that notice.*
7. *The exercise of the rights of eminent domain if a notice of the exercise, describing any part of the Land, is recorded in the Public Records.*
8. *Any taking by a governmental body that has occurred and is binding on the rights of a purchaser for value without Knowledge.*
9. *The invalidity or unenforceability of the lien of the Insured Mortgage upon the Title. This Covered Risk includes but is not limited to insurance against loss from any of the following impairing the lien of the Insured Mortgage*
   - *(a) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;*
   - *(b) failure of any person or Entity to have authorized a transfer or conveyance;*
   - *(c) the Insured Mortgage not being properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered;*
   - *(d) failure to perform those acts necessary to create a document by electronic means authorized by law;*
   - *(e) a document executed under a falsified, expired, or otherwise invalid power of attorney;*
   - *(f) a document not properly filed, recorded, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or*
   - *(g) a defective judicial or administrative proceeding.*
10. *The lack of priority of the lien of the Insured Mortgage upon the Title over any other lien or encumbrance.*
11. *The lack of priority of the lien of the Insured Mortgage upon the Title*
    - *(a) as security for each and every advance of proceeds of the loan secured by the Insured Mortgage over any statutory lien for services, labor, or material arising from construction of an improvement or work related to the Land when the improvement or work is either*
      - *(i) contracted for or commenced on or before Date of Policy; or*
      - *(ii) contracted for, commenced or continued after Date of Policy if the construction is financed, in whole or in part, by proceeds of the loan secured by the Insured Mortgage that the Insured has advanced or is obligated on Date of Policy to advance; and*
    - *(b) over the lien of any assessments for street improvements under construction or completed at Date of Policy.*
12. *The invalidity or unenforceability of any assignment of the Insured Mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the Insured Mortgage in the named Insured assignee free and clear of all liens.*
13. *The invalidity, unenforceabilty, lack of priority, or avoidance of the lien of the Insured Mortgage upon the Title*

EXHIBIT D

(a) resulting from the avoidance in whole or in part, or from a court order providing an alternative remedy, of any transfer of all or any part of the title to or any interest in the Land occurring prior to the transaction creating the lien of the Insured Mortgage because that prior transfer constituted a fraudulent or preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws; or

(b) because the Insured Mortgage constitutes a preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws by reason of the failure of its recording in the Public Records

(i) to be timely, or

(ii) to impart notice of its existence to a purchaser for value or to a judgment or lien creditor.

14. Any defect in or lien or encumbrance on the Title or other matter included in Covered Risks 1 through 13 that has been created or attached or has been filed or recorded in the Public Records subsequent to Date of Policy and prior to the recording of the Insured Mortgage in the Public Records.

The Company will also pay the costs, attorneys' fees, and expenses incurred in defense of any matter insured against by this Policy, but only to the extent provided in the Conditions.

IN WITNESS WHEREOF, CHICAGO TITLE INSURANCE COMPANY has caused this policy to be signed and sealed by its duly authorized officers.

CHICAGO TITLE INSURANCE COMPANY

Countersigned: _____
Authorized Signatory

By: _____

ATTEST _____ Secretary

ID2021 3030818277LAC
Alliance Title & Escrow Corporation
1070 Riverwalk Drive, Suite 100
Idaho Falls, ID 83402
Tel:(208) 524-5600
Fax:(208) 524-1977

Chicago Title Insurance Company

SCHEDULE A

Order Number	Policy Number	Date of Policy	Amount of Insurance	Premium Amount	Endorsement Amount
3030818277LAC	72307-75428032	February 29, 2008 At 4:06PM	$1,100,000.00	$2,980.00	$

Address Reference: 6371 N 5th E, Idaho Falls, ID 83401

1. Name of Insured:

   Idaho Development LLC

2. The estate or interest in the Land that is encumbered by the Insured Mortgage is:

   Fee Simple

3. Title is vested in:

   Teton View Golf Estates, LLC, an Utah Limited Liability Company

4. The Insured Mortgage and its assignments, if any, are described as follows:

   A Deed of Trust to secure an indebtedness in the amount shown below:
   Amount: $1,100,000.00.
   Trustor/Grantor: Teton View Golf Estates, LLC.
   Trustee: Alliance Title & Escrow Corp.
   Beneficiary: Idaho Development LLC
   Loan No.:
   Dated: February 29, 2008
   Recorded: February 29, 2008.
   Instrument No.: 1291905 of Official Records.

5. The Land referred to in this Policy is described as follows:

   See Exhibit A

Order No.: **3030818277LAC**
Policy No.: **72307-75428032**

Exhibit A

Beginning at a point that is South 0°27'09" East 25.00 feet along the section line from the Northeast Corner of Section 31, Township 3 North, Range 38, East of the Boise Meridian, County of Bonneville, State of Idaho, and running thence South 0°27'09" East 913.64 feet along the section line; thence South 89°32'51" West 1641.08 feet; thence South 39°14'56" East 502.03 feet to the 1/16th line of Section 31; thence South 89°00'06" West 104.71 feet to the centerline of the Idaho Canal; thence along the centerline of the Idaho Canal the following four courses: (1) North 36°27'12" West 633.43 feet; (2) North 15°03'08" West 239.69 feet; (3) North 1°10'58" East 246.69 feet; (4) North 2°53'42" East 297.79 feet to a point on the South Right-of-Way line of Tower Road; thence North 89°00'00" East 1839.63 feet along said road Right-of-Way to the POINT OF BEGINNING.

ALSO:

Beginning at a point that is South 00°16'08" East along the Section line 1066.05 feet from the Northeast Corner of Section 31; Township 3 North Range 38 East of the Boise Meridian, County of Bonneville, State of Idaho; running thence South 89°43'52" West 374.11 feet; thence North 00°49'18" West 127.48 feet; thence North 89°43'52" East 160.34 feet; thence South 00°16'08" East 100.00 feet; thence North 89°43'52" East 182.00 feet; thence North 00°16'08" West 100.00 feet; thence North 89°43'52" East 33.00 feet to the East line of said Section 31; thence South 00°16'08" East along the East line 127.47 feet to the POINT OF BEGINNING.

END OF SCHEDULE A

LOAN POLICY

Order No.: **3030818277LAC**
Policy No.: **72307-75428032**

SCHEDULE B

EXCEPTIONS FROM COVERAGE

This policy does not insure against loss or damage, and the Company will not pay costs, attorneys' fees or expenses that arise by reason of:

PART I

GENERAL EXCEPTIONS:

1. Rights or claims of parties in possession not shown by the public records.
2. Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land.
3. Easements, or claims of easements, not shown by the public records.
4. Any lien, or right to a lien, for services, labor, or material heretofore or hereafter furnished, imposed by law and not shown by the public records.
5. (a) Unpatented mining claims; (b) reservations or exceptions in patents or in Acts authorizing the issuance thereof; (c) water rights, claims or title to water, whether or not the matters excepted under (a), (b), or (c) are shown by the public records.
6. Taxes or special assessments which are not shown as existing liens by the public records of any taxing authority that levies taxes or assessments on real property or by the public records. Proceedings by a public agency which may result in taxes or assessments, or notices of such proceedings, whether or not shown by the records of such agency or by the public records.

7. Taxes, including any assessments collected therewith, for the year 2008, which are a lien not yet payable.

8. Rights of the public in and to that portion of the premises lying within Lewisville Hwy (5th East).

9. Rights of the public in and to that portion of the premises lying within Idaho Canal.

10. An easement for the purpose shown below and rights incidental thereto as set forth in document:
    Granted to: Bonneville County.
    Purpose: Water and/or Sewage Easement.
    Recorded: June 4, 1973.
    Instrument No.: 448274 of Official Records.

CONTINUED

Order No.: **3030818277LAC**
Policy No.: **72307-75428032**

11. An easement for the purpose shown below and rights incidental thereto as set forth in document:
    Granted to: Utah Power and Light Company.
    Purpose: Public Utilities.
    Recorded: July 22, 1980.
    Instrument No.: 589848 of Official Records.

12. Rights, interests, or claims which may exist or arise by reason of the following fact(s) shown on a survey plat entitled Record of Survey.
    Dated: March 2006.
    Prepared by: Benton Engineering, Job No. 4187.
    Recorded: March 27, 2006.
    Instrument No.: 1218553
    (Encroachments, Overlaps and or Boundary line disputes).

END OF SCHEDULE B - PART I

LOAN POLICY

Order No.: **3030818277LAC**
Policy No.: **72307-75428032**

SCHEDULE B

PART II

In addition to the matters set forth on Part I of this Schedule, the Title is subject to the following matters, and the Company insures against loss or damage sustained in the event that they are not subordinate to the lien of the Insured Mortgage:

1. A Deed of Trust to secure an indebtedness in the amount shown below and any other obligations secured thereby:
   Amount: $640,000.00.
   Trustor/Grantor: Teton View Golf Estates, LLC, an Utah Limited Liability Company.
   Trustee: AmeriTitle.
   Beneficiary: ZBS, LLC, an Idaho Limited Liability Company
   Dated: March 4, 2008
   Recorded: March 10, 2008.
   Instrument No.: 1292699 of Official Records.

2. An agreement to modify the terms and provisions of said Deed of Trust as therein provided.
   Referencing Instrument No. 1291905
   Recorded: March 10, 2008.
   Instrument No.: 1292697 of Official Records.

END OF SCHEDULE B

Countersigned:

_____
Authorized Signature

Schedule 'A' Policy Shipment Report Form (Loan)
Chicago Title

1. Office File Number: **3030818277LAC**
2. Policy Number: **72307-75428032**
3. Date of Policy: **2/29/2008**
4. Amount of Insurance: **$1,100,000.00**
5. Premium Amount: **$2,980.00**
6. Trans Type:
7. SI Ind:
8. Inf. End
9. Rate Code:
10. Rate Code: **$**
11. Rate Code:
12. Rate Code:
13. Rate Code:
14. Rate Code:
15. Reissue Amount: **$**

If Associate File

Name:

SCHEDULE A

Order No.: 3030818277LAC

1. Commitment date: 2/08/2008 at 7:30 A.M.

2. Policy or Policies to be issued:

(a) **ALTA Owner's Policy (6-17-06)** ☐ **Standard Coverage** ☐ **Extended Coverage**

Amount: **$**
Premium: **$**

Proposed Insured:

Teton View Golf Estates, LLC

(b) **ALTA Loan Policy (6-17-06)** ☒ **Standard Coverage** ☐ **Extended Coverage**

Amount: **$1,100,000.00**
Premium: **$2,980.00**

Endorsements: **Amount:** **$**

(c) **Second Loan Policy (6-17-06)** ☐ **Standard Coverage** ☐ **Extended Coverage**

Amount: **$**
Premium: **$**

Proposed Insured:

Idaho Development LLC

3. **Fee Simple** interest in the Land described in this Commitment is owned, at the Commitment Date, by:

ZBS, LLC, an Idaho Limited Liability Company

4. The Land referred to in this Commitment is described as follows:

See Attached Exhibit "A"

Exhibit "A"

Beginning at a point that is South 0°27'09" East 25.00 feet along the section line from the Northeast Corner of Section 31, Township 3 North, Range 38, East of the Boise Meridian, County of Bonneville, State of Idaho, and running thence South 0°27'09" East 913.64 feet along the section line; thence South 89°32'51" West 1641.08 feet; thence South 39°14'56" East 502.03 feet to the 1/16th line of Section 31; thence South 89°00'06" West 104.71 feet to the centerline of the Idaho Canal; thence along the centerline of the Idaho Canal the following four courses: (1) North 36°27'12" West 633.43 feet; (2) North 15°03'08" West 239.69 feet; (3) North 1°10'58" East 246.69 feet; (4) North 2°53'42" East 297.79 feet to a point on the South Right-of-Way line of Tower Road; thence North 89°00'00" East 1839.63 feet along said road Right-of-Way to the POINT OF BEGINNING.

ALSO:

Beginning at a point that is South 00°16'08" East along the Section line 1066.05 feet from the Northeast Corner of Section 31; Township 3 North Range 38 East of the Boise Meridian, County of Bonneville, State of Idaho; running thence South 89°43'52" West 374.11 feet; thence North 00°49'18" West 127.48 feet; thence North 89°43'52" East 160.34 feet; thence South 00°16'08" East 100.00 feet; thence North 89°43'52" East 182.00 feet; thence North 00°16'08" West 100.00 feet; thence North 89°43'52" East 33.00 feet to the East line of said Section 31; thence South 00°16'08" East along the East line 127.47 feet to the POINT OF BEGINNING.

SCHEDULE B - SECTION I

REQUIREMENTS

The following requirements must be met:

a. Pay the agreed amounts for the interest in the land and/or the mortgage to be insured.

b. Pay us the premiums, fees and charges for the policy.

c. Documents satisfactory to us creating the interest in the Land and/or the Mortgage to be insured must be signed, delivered and recorded.

d. You must tell us in writing the name of anyone not referred to in this Commitment who will get an interest in the Land or who will make a loan on the Land. We may then make additional requirements or exceptions.

e. A Deed from ZBS, LLC, an Idaho Limited Liability Company to Teton View Golf Estates, LLC.

f. A Deed of Trust (Mortgage) to secure the debt from Teton View Golf Estates, LLC to Idaho Development LLC.

g. The company will require a copy of articles of organization, operating agreements, if any, and a current list of its members and managers for ZBS LLC, a limited liability company.

h. The company will require a copy of articles of organization, operating agreements, if any, and a current list of its members and managers for Teton View Golf Estates, LLC, a limited liability company.

i. Your order for title work calls for a search of property that is identified by a street address only. Based on our records, we believe that the description in this commitment describes the land you have requested we insure, however, we can give no assurance of this.
To prevent errors and to be certain that the proper parcel of land will appear on the documents and on the policy of title insurance, we require verification of the legal description used for this commitment.

Note No.: 1: It has come to our attention that the insurance premium on this policy may be eligible for an "Owner's re-issue" rate. If the property described herein is being resold within two years of the date of purchase, upon submitting the previously issued owner's policy of title insurance to the company, and if the filed rate is applicable, the billing will be adjusted accordingly.

Note No.: 2: Taxes, including any assessments collected therewith, for the year shown below are paid.
(No Homeowner)
Amount: **$36.70**
Year: **2007**
Parcel No.: **rp03n38e310191.**

Note No.: 3: Taxes, including any assessments collected therewith, for the year shown below are paid.
(No Homeowner)
Amount: **$2,042.10**
Year: **2007.**
Parcel No.: **rp03n38e310052.**

Note No.: 4: In the event this transaction fails to close and this commitment is cancelled a fee will be charged complying with the state insurance code.

Note No.: 5: According to the available County Assessor's Office records, the purported address of said land is:

6371 N 5th E, Idaho Falls, ID 83401

Note No.: 6: We would like to take this opportunity to thank you for your business, and inform you that your Title Officer is **Laurie A. Cromwell,** and your Escrow Officer is **Mary L. Bruggenkamp.**

Copies of our privacy policies are available upon request. Please contact your title officer.

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3·10·08

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SCHEDULE B - SECTION II

EXCEPTIONS

Any policy we issue will have the following exceptions unless they are taken care of to our satisfaction.

1. Rights or claims of parties in possession not shown by the public records.
2. Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land.
3. Easements, or claims of easements, not shown by the public records.
4. Any lien, or right to a lien, for services, labor, or material heretofore or hereafter furnished, imposed by law and not shown by the public records.
5. (a) Unpatented mining claims; (b) reservations or exceptions in patents or in Acts authorizing the issuance thereof; (c) water rights, claims or title to water, whether or not the matters excepted under (a), (b), or (c) are shown by the public records.
6. Taxes or special assessments which are not shown as existing liens by the public records of any taxing authority that levies taxes or assessments on real property or by the public records. Proceedings by a public agency which may result in taxes or assessments, or notices of such proceedings, whether or not shown by the records of such agency or by the public records.

7. Taxes, including any assessments collected therewith, for the year 2008, which are a lien not yet payable.

8. Rights of the public in and to that portion of the premises lying within Lewisville Hwy (5th East).

9. Rights of the public in and to that portion of the premises lying within Idaho Canal.

10. An easement for the purpose shown below and rights incidental thereto as set forth in document:
    Granted to: Bonneville County.
    Purpose: Water and/or Sewage Easement.
    Recorded: June 4, 1973.
    Instrument No.: 448274 of Official Records.

11. An easement for the purpose shown below and rights incidental thereto as set forth in document:
    Granted to: Utah Power and Light Company.
    Purpose: Public Utilities.
    Recorded: July 22, 1980.
    Instrument No.: 589848 of Official Records.

12. Rights, interests, or claims which may exist or arise by reason of the following fact(s) shown on a survey plat entitled Record of Survey.
    Dated: March 2006.
    Prepared by: Benton Engineering, Job No. 4187.
    Recorded: March 27, 2006.
    Instrument No.: 1218553
    (Encroachments, Overlaps and or Boundary line disputes).

13. A Deed of Trust to secure an indebtedness in the amount shown below and any other obligations secured thereby:
Amount: $702,778.00.
D/R Trustor/Grantor: ZBS, LLC an Idaho Limited Liability Company.
#1293740 Trustee: Ameritite.
Beneficiary: Citizens Community Bank
3·18·08 Dated: May 9, 2007
Recorded: May 11, 2007.
Ppl 739 Instrument No.: 1262669 of Official Records.

END OF SCHEDULE B

DO[illegible] DATE

RECORD

Alliance Title & Escrow Corp.
1070 Riverwalk Dr., Suite 100
Idaho Falls, ID 83402
Attn: Laurie Cromwell
Title No.: 3030818277LAC

Escrow No.: 3030818277MLB
Date: February 29, 2008
Escrow Officer: Mary L. Bruggenkamp
Phone No.: (208) 524-5600
1070 Riverwalk Dr., Suite 100
Idaho Falls, ID 83402

POLICY WRITE UP AND RECORDING INSTRUCTIONS

Please HOLD until released __the following documents which are enclosed for recording on 02/29/08
Released by: _____ Date: _____ Time: _____

X	Deed of Trust	Teton View Golf Estates, LLC	to Idaho Development LLC

OWNERS POLICY
Product
Insured
Liability
Premium
Endorsements
Excepts to remain
Delivery Address:

Include Ref No:

Exceptions paid thru escrow

LENDERS POLICY

Product	Standard
Insured	Idaho Development LLC
Liability	$1,100,000.00
Premium	$2,980.00
Endorsements	
Excepts to Remain	Sch B-Sec 2 7-12
Delivery Address:	2192 Preston St
	Salt Lake City, UT 84106

Include Ref No:
Exceptions to show current

SECOND LENDERS POLICY
Product
Insured
Liability
Premium
Endorsements
Excepts to Remain
Delivery Address:
Include Ref No:

SPECIAL INSTRUCTIONS: # 13 I being paid by Amerititle. AmeriTitle closed the Buy/Sale .

Send copy of Recorded Deed to:

Record by E-ing

No WD f

Per 583 in LB

[redacted]

Fee Number: 2589

FEE TRANSFER VERIFICATION

Alliance Title & Escrow Corp.
Idaho Falls
1070 Riverwalk Dr., Suite 100
Idaho Falls, ID 83402

Property Address:
6371 N 5th E
Idaho Falls, ID 83401

Escrow Officer: Mary L. Bruggenkamp
Escrow Officer ID:
Escrow No: 3030818277MLB
Date: 2/29/2008

Buyer: Teton View Golf Estates, LLC
Seller: ZBS, LLC

Check has been transferred to a Fee Account

Fee Account Name: Title Fees

PAYABLE TO: Alliance Title & Escrow Corp.

AMOUNT: $2,994.00

FOR:

Lender/Mortgagee Premium	$2,980.00 4011
Mortgage Recording Fee	$14.00 4242

Printed Date: 2/29/2008

Total: 2,994.00

Instrument # 1291905
IDAHO COUNTY, BONNEVILLE, IDAHO
2008-02-29 04:06:00 PM No. of Pages: 2
Recorded for: ALLIANCE TITLE - IDAHO FA
RONALD LONGMORE Fee:6.00
Ex-Officio Recorder Deputy SSolis
Index To: DEED OF TRUST
Electronically Recorded by Simplifile

Order No. 3030818277LAC

COMMERCIAL LOAN
DEED OF TRUST

THIS DEED OF TRUST, Made this **February 29, 2008** BETWEEN **Teton View Golf Estates, LLC** herein called **GRANTOR**, whose address is: 6371 N. 5th S., Idaho Falls, ID 83401, AND **Alliance Title & Escrow Corp.**, herein called **TRUSTEE**, AND **Idaho Development, LLC**, herein called **BENEFICIARY**, whose address is 2192 Preston Street, Salt Lake City, UT 84106.

WITNESSETH: That Grantor does hereby irrevocably GRANT, BARGAIN, SELL AND CONVEY TO TRUSTEE IN TRUST WITH POWER OF SALE, that property in the county of **Bonneville**, State of Idaho, described as follows and containing not more than forty acres:

Beginning at a point that is South 0°27'09" East 25.00 feet along the section line from the Northeast Corner of Section 31, Township 3 North, Range 38, East of the Boise Meridian, County of Bonneville, State of Idaho, and running thence South 0°27'09" East 913.64 feet along the section line; thence South 89°32'51" West 1641.08 feet; thence South 39°14'56" East 502.03 feet to the 1/16th line of Section 31; thence South 89°00'06" West 104.71 feet to the centerline of the Idaho Canal; thence along the centerline of the Idaho Canal the following four courses: (1) North 36°27'12" West 633.43 feet; (2) North 15°03'08" West 239.69 feet; (3) North 1°10'58" East 246.69 feet; (4) North 2°53'42" East 297.79 feet to a point on the South Right-of-Way line of Tower Road; thence North 89°00'00" East 1839.63 feet along said road Right-of-Way to the POINT OF BEGINNING.

ALSO:

Beginning at a point that is South 00°16'08" East along the Section line 1066.05 feet from the Northeast Corner of Section 31; Township 3 North Range 38 East of the Boise Meridian, County of Bonneville, State of Idaho; running thence South 89°43'52" West 374.11 feet; thence North 00°49'18" West 127.48 feet; thence North 89°43'52" East 160.34 feet; thence South 00°16'08" East 100.00 feet; thence North 89°43'52" East 182.00 feet; thence North 00°16'08" West 100.00 feet; thence North 89°43'52" East 33.00 feet to the East line of said Section 31; thence South 00°16'08" East along the East line 127.47 feet to the POINT OF BEGINNING.

TOGETHER WITH the rents, issues and profits thereof, SUBJECT, HOWEVER, to the right, power and authority hereinafter given to and conferred upon Beneficiary to collect and apply such rents, issues and profits.
For the purpose of securing payment of the indebtedness evidenced by a promissory note, of even date herewith, executed by Grantor in the sum of **$1,100,000.00**, with final payment due: **May 28, 2008**, and to secure payment of all such further sums as may hereafter be loaned or advanced by the Beneficiary herein to the Grantor herein, or any or either of them, while record owner of present interest, for any purpose, and of any notes, drafts or other instruments representing such further loans, advances or expenditures together with interest on all such sums at the rate therein provided. Provided, however, that the making of such further loans, advances or expenditures shall be optional with the Beneficiary, and provided further, that it is the express intention of the parties to this Deed of Trust that it shall stand as continuing security until paid for all such advances together with interest thereon.

A. **To protect the security of this Deed of Trust, Grantor agrees:**

1. To keep said property in good condition and repair, not to remove or demolish any building thereon, to complete or restore promptly and in good and workmanlike manner any building which may be constructed, damaged or destroyed thereon and to pay when due all claims for labor performed and materials furnished therefor; to comply with all laws affecting said property or requiring any alterations or improvements to be made thereon; not to commit or permit waste thereof; not to commit, suffer or permit any act upon said property in violation of law; to cultivate, irrigate, fertilize, fumigate, prune and do all other acts which from the character or use of said property may be reasonably necessary, the specific enumerations herein not excluding the general.

2. To provide, maintain and deliver to Beneficiary fire insurance satisfactory to and with loss payable to Beneficiary. The amount collected under any fire or other insurance policy may be applied by beneficiary upon any indebtedness secured hereby and in such order as Beneficiary may determine, or at option of Beneficiary the entire amount so collected or any part thereof may be released to Grantor. Such application or release shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice.

3. To appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee; and to pay all costs and expenses, including cost of evidence of title and attorney's fees in a reasonable sum, in any such action or proceeding in which Beneficiary or Trustee may appear.

4. To pay, at least ten days before delinquency all taxes and assessments affecting said property, when due, all encumbrances, charges and liens, with interest, on said property or any part thereof, which appear to be prior or superior hereto; all costs, fees and expenses of this Trust. In Addition to the payments due in accordance with the terms of the note hereby secured the Grantor shall at the option, and on demand of the Beneficiary, pay each month 1/12 of the estimated annual taxes assessments, insurance premiums, maintenance and other charges upon the property, nevertheless in trust for Grantor's use and benefit and for the payment by Beneficiary of any such items when due. Grantor's failure so to pay shall constitute a default under this trust.

5. To pay immediately and without demand all sums expended by Beneficiary or Trustee pursuant to the provisions hereof, with interest from date of expenditure at the rate of interest specified in the above described promissory note.

6. Should Grantor fail to make any payment or to do any act as herein provided, then Beneficiary or Trustee, but without obligation so to do and without notice to or demand upon Grantor and without releasing Grantor from any obligations hereof, may; make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof, Beneficiary or Trustee being authorized to enter upon said property for such purposes; appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee; pay, purchase, contest or compromise any encumbrance, charge or lien which in the judgement of either appears to be prior or superior hereto; and, in exercising any such powers, or in enforcing this Deed of Trust by judicial foreclosure, pay necessary expenses, employ counsel and pay his reasonable fees.

AmeriTitle
Part Of The JELD-WEN Family

Instrument # 1292698
IDAHO FALLS, BONNEVILLE, IDAHO
2008-03-10 12:51:00 PM No. of Pages: 2
Recorded for: AMERITITLE - IDAHO FALLS
RONALD LONGMORE Fee:6.00
Ex-Officio Recorder Deputy SSolis
Index To: DEED WARRANTY
Electronically Recorded by Simplifile

IDWD
Order No. 10-44357 A

WARRANTY DEED

For Value Received,

ZBS, LLC, an Idaho Limited Liability Company

GRANTOR(s), do(es) hereby GRANT, BARGAIN, SELL and CONVEY unto

Teton View Golf Estates, LLC, an Utah Limited Liability Company

GRANTEE(s), whose address is: 6371 N 5th E, Idaho Falls, ID 83401
Mailing: 11105 Lonam Derry, Sandy, UT 84092
the following described real property, to-wit:

Beginning at a point that is S 0°27'09" E 25.00 feet along the section line from the Northeast corner of Section 31, Township 3 North, Range 38, East of the Boise Meridian, Bonneville County, Idaho, and running thence S 0°27'09" E 913.64 feet along the Section line; thence S 89°32'51" W 1641.08 feet; thence S 39°14'56" E 502.03 feet to the 1/16th line of Section 31; thence S 89°00'06" W 104.71 feet to the centerline of the Idaho Canal; thence along the centerline of the Idaho Canal the following four courses: (1) N 36°27'12" W 633.43 feet; (2) N 15°03'08" W 239.69 feet; (3) N 1°10'58" E 246.69 feet; (4) N 2°53'42" E 297.79 feet to a point on the South Right-of-Way line of Tower Road; thence N. 89°00'00" E 1839.63 feet along said road Right-of-Way to the point of beginning.

ALSO:

Beginning at a point that is S 00°16'08" E along the section line 1066.05 feet from the Northeast corner of Section 31, Township 3 North, Range 38 East of the Boise Meridian, Bonneville County, Idaho; running thence S 89°43'52" W 374.11 feet; thence N 00°49'18" W 127.48 feet; thence N 89°43'52" E 160.34 feet; thence S 00°16'08" E 100.00 feet; thence N 89°43'52" E 182.00 feet; thence N 00°16'08" W 100.00 feet; thence N 89°43'52" E 33.00 feet to the East line of said Section 31; thence S 00°16'08" E along the East line 127.47 feet to the point of beginning.

TO HAVE AND TO HOLD the premises with its appurtenances unto the said Grantees, their heirs and assigns forever. And the said Grantors do hereby covenant to and with the said Grantees, that they are the owners in fee simple of said premises that said premises are free from all encumbrances except the current year's taxes and assessments, conditions, covenants, restrictions, reservations, easements, rights and rights of way, apparent or of record and that they will warrant and defend the same from all lawful claims whatsoever.

DATED this 20 day of February, 2008.

ZBS, LLC

BY: _____
Steven W Zundel, Manager

1292698

STATE OF IDAHO)
)ss
COUNTY OF Bonneville)

On this 20th day of February, 2008, before me, the undersigned, a Notary Public in and for said State, personally appeared Steven W Zundel as the Manager of ZBS LLC a Limited Liability Company, known or identified to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same in such capacity.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this instrument first above written.

Notary Public
Residing at: Pingree
Commission Expires: 11/1/12

MARCI J. BRADLEY
NOTARY PUBLIC
STATE OF IDAHO

1292698

AMT 10-44357

Instrument # 1292699
IDAHO FALLS, BONNEVILLE, IDAHO
2008-03-10 12:51:00 PM No. of Pages: 4
Recorded for: AMERITITLE - IDAHO FALLS
RONALD LONGMORE Fee:12.00
Ex-Officio Recorder Deputy SSolis
Index To: DEED OF TRUST
Electronically Recorded by Simplifile

AmeriTitle
Part Of The JELD-WEN Family

DEED OF TRUST

THIS DEED OF TRUST, Dated March 4, 2008, between **Teton View Golf Estates, LLC, an ~~Idaho~~ Utah Limited Liability Company**, herein called GRANTOR; whose address is **6371 N 5th E, Idaho Falls, ID 83401**; **AmeriTitle** herein called TRUSTEE, and **ZBS, LLC, an Idaho Limited Liability Company**, herein called BENEFICIARY.

WITNESSETH: That Grantor does hereby irrevocably GRANT, BARGAIN, SELL AND CONVEY TO TRUSTEE IN TRUST, WITH POWER OF SALE, that property in the County of **Bonneville**, State of Idaho, described as follows and containing not more than forty acres:

Beginning at a point that is S 0°27'09" E 25.00 feet along the section line from the Northeast corner of Section 31, Township 3 North, Range 38, East of the Boise Meridian, Bonneville County, Idaho, and running thence S 0°27'09" E 913.64 feet along the Section line; thence S 89°32'51" W 1641.08 feet; thence S 39°14'56" E 502.03 feet to the 1/16th line of Section 31; thence S 89°00'06" W 104.71 feet to the centerline of the Idaho Canal; thence along the centerline of the Idaho Canal the following four courses: (1) N 36°27'12" W 633.43 feet; (2) N 15°03'08" W 239.69 feet; (3) N 1°10'58" E 246.69 feet; (4) N 2°53'42" E 297.79 feet to a point on the South Right-of-Way line of Tower Road; thence N. 89°00'00" E 1839.63 feet along said road Right-of-Way to the point of beginning.

ALSO:

Beginning at a point that is S 00°16'08" E along the section line 1066.05 feet from the Northeast corner of Section 31, Township 3 North, Range 38 East of the Boise Meridian, Bonneville County, Idaho; running thence S 89°43'52" W 374.11 feet; thence N 00°49'18" W 127.48 feet; thence N 89°43'52" E 160.34 feet; thence S 00°16'08" E 100.00 feet; thence N 89°43'52" E 182.00 feet; thence N 00°16'08" W 100.00 feet; thence N 89°43'52" E 33.00 feet to the East line of said Section 31; thence S 00°16'08" E along the East line 127.47 feet to the point of beginning.

TOGETHER WITH the rents, issues and profits thereof, SUBJECT, HOWEVER, to the right, power and authority hereinafter given to and conferred upon Beneficiary to collect and apply such rents, issues and profits.

FOR THE PURPOSE OF SECURING payment of the indebtedness evidenced by a promissory note, of even date herewith, executed by Grantor in the sum of ****SIX HUNDRED FORTY THOUSAND AND NO/100ths** Dollars, with interest thereon**, final payment due **02/28/2009**, and to secure payment of all such further sums as may hereafter be loaned or advanced by the Beneficiary herein to the Grantor herein, or any or either of them, while record owner of present interest, for any purpose, and of any notes, drafts or other instruments representing such further loans, advances or expenditures together with interest on all such sums at the rate therein provided. PROVIDED, HOWEVER, that the making of such further loans, advances or expenditures shall be optional with the Beneficiary, and further provided that it is the express intention of the parties to this Deed of Trust that it shall stand as continuing security until paid for all advances together with interest thereon.

The date of maturity of the debt secured by this instrument is the date, stated above, on which the final installment of said note becomes due and payable. In the event the within described property, or any part thereof, or any interest therein is sold, agreed to be sold, conveyed, assigned, or alienated by the grantor without first having obtained the written consent or approval of the beneficiary, then, at the beneficiary's option, all obligations secured by this instrument, irrespective of the maturity dates expressed therein or herein, shall become immediately due and payable.

A. **To protect the security of this Deed of Trust, Grantor agrees:**

1. To keep said property in good condition and repair; not to remove or demolish any building thereon; to complete or restore promptly and in good and workmanlike manner any building which may be constructed, damaged or destroyed thereon and to pay when due all claims for labor performed and materials furnished therefor; to comply with all laws affecting said property or requiring any alterations or improvements to be made thereon; not to commit or permit waste thereof; not to commit, suffer or permit any act upon said property in violation of law; to cultivate, irrigate, fertilize, fumigate, prune and do all other acts which from the character or use of said property may be reasonably necessary, the specific enumerations herein not excluding the general.

2. To provide, maintain and deliver to Beneficiary fire insurance satisfactory to and with loss payable to Beneficiary. The amount collected under any fire or other insurance policy may be applied by Beneficiary upon any indebtedness secured hereby and in such order as Beneficiary may determine, or at option of beneficiary the entire amount so collected or any part thereof may be released to Grantor. Such application or release shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice.

3. To appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee; and to pay all costs and expenses, including cost of evidence of title and attorneys' fees in a reasonable sum, in any such action or proceeding in which Beneficiary or Trustee may appear.

4. To pay, at least ten days before delinquency all taxes and assessments affecting said property, and when due, all encumbrances, charges and liens, with interest, on said property or any part thereof, which appear to be prior or superior hereto, and all costs, fees and expenses of this Trust. In addition to the payments due in accordance with the terms of the note hereby secured the Grantor shall, at the option, and on demand of the Beneficiary, pay each month 1/12 of the estimated annual taxes, assessments, insurance premiums, maintenance and other charges upon the property, nevertheless in trust for Grantor's use and benefit and for the payment by Beneficiary of any such items when due. Grantor's failure so to pay shall constitute a default under this Deed of Trust.

5. To pay immediately and without demand all sums expended by Beneficiary or Trustee pursuant to the provisions hereof with interest from date of expenditure at lesser of **9.0000%** per annum.

6. Should Grantor fail to make any payment or to do any act as herein provided, then Beneficiary or Trustee, but without obligation so to do and without notice to or demand upon Grantor and without releasing Grantor from any obligation hereof, may: make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof, Beneficiary or Trustee being authorized to enter upon said property for such purposes; appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee; pay, purchase, contest or compromise any encumbrance, charge or lien which in the judgment of either appears to be prior or superior hereto; and, in exercising any such powers, or in enforcing this Deed of Trust by judicial foreclosure, pay necessary expenses, employ counsel and pay counsel's reasonable fees.

B. **It is mutually agreed that:**

1. Any award of damages in connection with any condemnation for public use of or injury to said property or any part thereof is hereby assigned and shall be paid to Beneficiary who may apply or release such monies received by him in the same manner and with the same effect as above provided for disposition of proceeds of fire or other insurance.

2. By accepting payment of any sum secured hereby after its due date, Beneficiary does not waive the right either to require prompt payment when due of all other sums so secured or to declare default for failure so to pay.

3. At any time or from time to time, without liability therefor and without notice, upon written request of Beneficiary and presentation of this Deed of Trust and of this deed and said note for endorsement, and without affecting the personal liability of any person for payment of the indebtedness secured hereby, Trustee may: reconvey all or any part of said property; consent to the making of any map or plat thereof; join in granting any easement thereon; or join in any extension agreement or any agreement subordinating the lien or charge hereof.

4. Upon written request of Beneficiary stating that all sums secured hereby have been paid, and upon surrender of this Deed of Trust and said note to Trustee for cancellation and retention and upon payment of its fees,

Trustee shall reconvey, without warranty, the property then held hereunder. The recitals in any reconveyance executed under this Deed of Trust of any matters or facts shall be conclusive proof of the truthfulness thereof. The grantee in such reconveyance may be described as "the person or persons legally entitled thereto".

5. As additional security, Grantor hereby gives to and confers upon Beneficiary the right, power and authority, during the continuance of these Trusts, to collect the rents, issues and profits of said property, reserving unto Grantor the right, prior to any default by Grantor in payment of any indebtedness secured hereby or in performance of any agreement hereunder, to collect and retain such rents issues and profits as they become due and payable. Upon any such default, Beneficiary may at any time without notice, either in person, by agent, or by a receiver to be appointed by a court, and without regard to the adequacy of any security for the indebtedness hereby secured, enter upon and take possession of said property or any part thereof, in its own name sue for or otherwise collect such rents, issues and profits, including those past due and unpaid, and apply the same, less costs and expenses of operation and collection, including reasonable attorneys' fees, upon any indebtedness secured hereby, and in such order as Beneficiary may determine. The entering upon and taking possession of said property, the collection of such rents, issues and profits and the application thereof as aforesaid, shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice.

6. Upon default by Grantor in payment of any indebtedness secured hereby or in performance of any agreement hereunder, all sums secured hereby shall immediately become due and payable at the option of the Beneficiary. In the event of default, Beneficiary shall execute or cause the Trustee to execute a written notice of such default and of his election to cause to be sold the herein described property to satisfy the obligation hereof, and shall cause such notice to be recorded in the office of the recorder of each county wherein said real property or some part thereof is situated.

Notice of sale having been given as then required by law, and not less than the time then required by law having elapsed, Trustee, without demand on Grantor, shall sell said property at the time and place fixed by it in said notice of sale, either as a whole or in separate parcels and in such order as it may determine, at public auction to the highest bidder for cash in lawful money of the United States, payable at time of sale. Trustee shall deliver to the purchaser its deed conveying the property so sold, but without any covenant or warranty express or implied. The recitals in such deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including Grantor, Trustee or Beneficiary, may purchase at such sale.

After deducting all costs, fees and expenses of Trustee and of this Deed of Trust, including cost of evidence of title and reasonable counsel fees in connection with sale, Trustee shall apply the proceeds of sale to payments of: all sums expended under the terms hereof, not then repaid, with accrued interest thereon; all other sums then secured hereby; and the remainder, if any, to the person or persons legally entitled thereto.

7. This Deed of Trust applies to, inures to the benefit of, and binds all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns. The term Beneficiary shall mean the holder and owner of the note secured hereby; or, if the note has been pledged, the pledgee thereof. In this Deed of Trust, whenever the context so requires, the gender used shall also include the masculine, feminine and/or neuter, and the singular number includes the plural.

8. Trustee is not obligated to notify any party hereto of pending sale under any other Deed of Trust or of any action or proceeding in which Grantor, Beneficiary or Trustee shall be a party unless brought by Trustee.

9. In the event of dissolution or resignation of the Trustee, the Beneficiary may substitute a trustee or trustees to execute the trust hereby created, and when any such substitution has been filed for record in the office of the Recorder of the county in which the property herein described is situated, it shall be conclusive evidence of the appointment of such trustee or trustees and such new trustee or trustees shall succeed to all of the powers and duties of the trustee or trustees named herein.

Request is hereby made that a copy of any Notice of Default and a copy of any Notice of Sale hereunder be mailed to the Grantor at the address of Grantor, which is set forth above.

GRANTOR(S):

Teton View Golf Estates, LLC

by _____
St Charles Group, Inc., by

by _____
Western Equity, LLC, by

STATE OF Idaho)
)ss
COUNTY OF Bonneville)

On this 4th day of ~~February~~ March, 2008, before me, the undersigned, a Notary Public in and for said State, personally appeared Tony Versteeg as authorized signatory of St Charles Group Inc. and Tony Versteeg as Manager of Western Equity, LLC as the Managers of Teton View Golf Estates, LLC a Limited Liability Company, known or identified to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same in such capacities.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this instrument first above written.

_____
Notary Public
Residing at: Pingree
Commission Expires: 11/1/12

Read and approved

_____

MARCI J. BRADLEY
NOTARY PUBLIC
STATE OF IDAHO

Ref: IF10-44357

IDDT - 4 1292699

AMT

AMENDMENT OF DEED OF TRUST

THIS AMDNDMENT is made by and between Teton View Golf Estates, LLC, and Idaho Development, LLC hereinafter referred to as **"BENEFICIARY"**,

WITNESSETH:

WHEREAS, the Grantor did make, execute and deliver to the Beneficiary a Note secured by that certain Deed of Trust in the amount of One Million, one hundred thousand and no/100 Dollars, ($1,100,000.00), recorded as Instrument No. 1291905, in the records of Bonneville County, Idaho, covering the premises described as follows:

Beginning at a point that is S 0°27'09" E 25.00 feet along the section line from the Northeast corner of Section 31, Township 3 North, Range 38, East of the Boise Meridian, Bonneville County, Idaho, and running thence S 0°27'09" E 913.64 feet along the Section line; thence S 89°32'51" W 1641.08 feet; thence S 39°14'56" E 502.03 feet to the 1/16th line of Section 31; thence S 89°00'06" W 104.71 feet to the centerline of the Idaho Canal; thence along the centerline of the Idaho Canal the following four courses: (1) N 36°27'12" W 633.43 feet; (2) N 15°03'08" W 239.69 feet; (3) N 1°10'58" E 246.69 feet; (4) N 2°53'42" E 297.79 feet to a point on the South Right-of-Way line of Tower Road; thence N. 89°00'00" E 1839.63 feet along said road Right-of-Way to the point of beginning.

ALSO:

Beginning at a point that is S 00°16'08" E along the section line 1066.05 feet from the Northeast corner of Section 31, Township 3 North, Range 38 East of the Boise Meridian, Bonneville County, Idaho; running thence S 89°43'52" W 374.11 feet; thence N 00°49'18" W 127.48 feet; thence N 89°43'52" E 160.34 feet; thence S 00°16'08" E 100.00 feet; thence N 89°43'52" E 182.00 feet; thence N 00°16'08" W 100.00 feet; thence N 89°43'52" E 33.00 feet to the East line of said Section 31; thence S 00°16'08" E along the East line 127.47 feet to the point of beginning.

And

WHEREAS, the parties desire to amend some of the terms and/or provisions of the Note and/or Deed of Trust, and

THEREFORE, in and for good and valuable considerations, the parties agree the terms and conditions of the Deed of Trust above described shall be and are hereby amended and modified as follows:

1. The amount of the Deed of Trust shall be amended to $850,000.00.

All terms and conditions of the Note and Deed of Trust shall remain the same and unchanged except as amended and/or modified herein.

Dated 3/7/08

GRANTOR:

Teton View Golf Estates, LLC

By _____
Tony Versteeg as authorized signatory for St Charles Group, Inc, Manager

By _____
Tony Versteeg as Manager of Western Equity, LLC, Manager

BENEFICIARY:

Idaho Development, LLC

By _____

Instrument # 1292697
IDAHO FALLS, BONNEVILLE, IDAHO
2008-03-10 12:51:00 PM No. of Pages: 2
Recorded for: AMERITITLE - IDAHO FALLS
RONALD LONGMORE Fee:6.00
Ex-Officio Recorder Deputy SSolis
Index To: AMENDMENT
Electronically Recorded by Simplifile

This instrument is being filed as an accommodation only. It has not been examined as to it's execution, insurability or affect on title.

1292697

STATE OF Utah)
) ss
COUNTY OF Salt Lake)

On this 7th day of March, 2008, before me, the undersigned, personally appeared Tony Versteeg as authorized signatory for St Charles Group, Inc and as Manager of Western Equity, LLC known or identified to me to be the Managing Member(s) of the limited liability company that executed the within instrument, and acknowledged to me that such company executed the same.

Notary Public
Commission Expiration Date: _____

Notary Public
BRADLEY KNIGHT
3779 South 8000 West
Magna, Utah 84044
My Commission Expires
December 22, 2009
State of Utah

STATE OF Utah)
) ss
COUNTY OF Salt Lake)

On this 7th day of March, 2008, before me, the undersigned, personally appeared Melinda Boswell - Manager known or identified to me to be the Managing Member(s) of the limited liability company that executed the within instrument, and acknowledged to me that such company executed the same.

Notary Public
Commission Expiration Date: _____

Notary Public
BRADLEY KNIGHT
3779 South 8000 West
Magna, Utah 84044
My Commission Expires
December 22, 2009
State of Utah

GENERAL INDEX/ RECORDING DATEDOWN	ORDER #: 3030818277LAC
Title Officer: Laurie A. Cromwell	County: Bonneville

NAMES	EFFECTIVE DATE	REMARKS
ZBS, LLC	2-8-08	
Teton View Golf Estates, LLC	2-8-08	
		XXXX XXXX
		ARB 93, 166, 171,172 31-3n-38e
		/

RECORDING DATEDOWN (UPDATE)	PLANT DATE:	BY:	RECORDING CLERK:	DATE	TIME
RECORDING DATEDOWN: (UPDATE)	PLANT DATE:	BY:	RECORDING CLERK:	DATE	TIME
RECORDING DATEDOWN (UPDATE)	PLANT DATE:	BY:	RECORDING CLERK:	DATE	TIME

SPECIAL INSTRUCTIONS ☐	***CALL:*** ☐ ***WITH RECORDING #***	okpertc **HOLD RECORDINGS**

GRANTOR	GRANTEE	DOC TYPE	RECORDING DATE & TIME	INSTRUMENT NO.	FEES	
		DOT	2/29/08 4:06	1291905	6	5
			599			

ALLIANCE
TITLE & ESCROW CORP.
1070 Riverwalk Dr., Suite 100, Idaho Falls, ID 83402 (208) 524-5600 Fax No. (208) 524-1977

To: **Idaho Development LLC**
2192 Preston St
Salt Lake City, UT 84106

Order No.: **3030818277LAC**
Date: **March 20, 2008**
Reference: **Teton View Gold Estates**
Loan No.:

Attention: **Melinda Boswell**

In connection with the above transaction, we enclose:

X **Policy of Title Insurance No. 72307-75428032**
X **Deed of Trust #1291905**
X **Promissory Note**

Thank you for giving us the opportunity of serving you!

Alliance Title & Escrow Corp.

By: _____
Diane Dexter

NEW ORDER WORK SHEET

Order Taken by NB Date 2/18/08 Time 11:05 New Order # 3030818277

Customer Reference # _____ Prior Order # _____

Est. Closing Date _____ ☐ Issue ☐ Hold) Esc. Closer NB

VERBAL BY: Date _____ Time _____ **COMMIT BY:** Date _____ Time _____

Who Placed the Order? _____ Phone # _____

Co _____ Address _____

SEND TO: ☐ Escrow ☐ Lender ☐ Agent(s) ☐ Other(s) _____

Buyer/Borrower Teton View Golf Estates, LLC Marital Status _____

Social Security #'s _____ _____ E-mail Address _____

Address _____ Phone # _____

Owner/Seller _____ Marital Status _____

Social Security #'s _____ _____ E-mail Address _____

Address _____ Phone # _____

Lender Idaho Development, LLC Attn Melinda Boswell

Address 2192 Preston St., Salt Lake City UT 84106 Phone # _____

E-mail _____ Fax # _____

☐ List Agt. or ☐ Other _____ Co _____

Address _____ Phone # _____

E-mail _____ Fax # _____

☐ Sell Agt. or ☐ Other _____ Co _____

Address _____ Phone # _____

E-mail _____ Fax # _____

Other _____ Co _____

Address _____ Phone # _____

E-mail _____ Fax # _____

LEGAL DESCRIPTION

R4N3N38E310048

☐ Mobile or ☐ Manufactured Home? Serial # _____

☐ Agricultural ☒ Bare Ground ☐ Commercial ☐ Multi-Family ☐ Single Family

Property Address _____ City _____

County _____ State _____ Zip _____ Tax Parcel # _____

TRANSACTION

Owner $ _____ ☐ STD ☐ HE ☐ EXT ☐ ASSUMPTION ☐ CASH

LOAN $ 6,100,000.00 ☐ STD ☐ EXT

☐ RE-FI → ☐ 1ST ☐ 2ND

☐ DEVELOP ☐ NEW CONST ☐ RE-MODEL

End ☐ 9-06 ☐ 22-06 ☐ 8.1-06 ☐ ALTA 5-06 ☐ ALTA 6-06

☐ 102.4 OTHER END(S): _____

☐ FRCL COMMIT ☐ TSG ☐ LTG $ _____

☐ OTHER $ _____

PRODUCT *(check one)*

☐ RESID NEW	4001	☒ C&I	4011
☐ RESID RESALE	4002	☐ C&I AGR	4022
☐ RESID REFI	4003	☐ C&I GOV	4021
☐ RESID 2ND	4004	☐ TSG	4026
☐ RESID OTHER	4005	☐ R.D. GUAR	4028
☐ LT BK GUAR	4023		
☐ LLCP	4024		
☐ SMART	4025		
☐ Lot Book/D&E	4101		

PAYOFF

1st Lender _____ Loan # _____

1st Lender _____ Loan # _____

Other(s) _____

Special Instructions _____

Date: February 20, 2008 Time: 10:26AM Page No.: 1
Title Order Nbr.: 3030818277CS Escrow Nbr.: 3030818277MLB

Alliance Title & Escrow Corp.
ORDER FOR TITLE INSURANCE

Sales Price:				**Open Date:**	2/14/2008
Loan Amt:	$1,100,000.00			**Opened By:**	Randi Farmer
Escrow Officer:	Mary L. Bruggenkamp			**Promised Date:**	2/15/2008
Phone Nbr.:	(208) 524-5600 Ext. 333	**Fax:**		**Est. Closing Date:**	2/21/2008
Title Type:	Owners			**Escrow Type:**	Conventional Resale

TYPE OF POLICY	LIABILITY AMOUNT

LEGAL DESCRIPTION:

Subdivision:					
County:	Bonneville	State:	ID	Township:	3n
Lot:		Block:		Map Nbr:	
Section:	31	Range:	38	Filing Date	
Book:		Page:		Plat Nbr	
Unit:		Building Nbr:		Tract Nbr:	
Abstract Nbr:		Judicial Dist		Arb Nbr:	
Cert Nbr:		Doc Nbr:		Ins Nbr:	
Portion:					
Parcel Nbr(s):	rpo3n38e310048				

PROPERTY ADDRESS: 6371 N 5th E
Idaho Falls, ID 83401

PROPERTY TYPE: Land Only

SPECIAL INSTRUCTION: Updated data entry 2/20/2008. Corrected buyer information. RF

INTERESTED PARTIES:					COPIES
BUYER:	Teton View Golf Estates, LLC				0
ADDRESS:					
PHONE:	Work: x	Home:	Fax:		
SSN:					
COMMENTS:					
SELLER:	Darold D. White				0
ADDRESS:	6371 N 5th E Idaho Falls, ID 83401				
PHONE:	Work: x	Home:	Fax:		
SSN:					
COMMENTS:					
PRIM. CUSTOMER:	Idaho Development LLC				0
ADDRESS:	2192 Preston St Salt Lake City, UT 84106				
PHONE:	Work: x	Fax:	Email:		
CONTACT:	Melinda Boswell	Work: x		Email:	
REFERENCE:					
COMMENTS:					

Date: February 20, 2008	Time: 10:26AM	Page No.:	2
Title Order Nbr.:	3030818277CS	Escrow Nbr.:	3030818277MLB

Alliance Title & Escrow Corp.
ORDER FOR TITLE INSURANCE

NEW LENDER:	Idaho Development LLC				1
ADDRESS:	2192 Preston St Salt Lake City, UT 84106				
PHONE:	Work: x	Fax:	Email:		
CONTACT:	Melinda Boswell	Work: x		Email:	
REFERENCE:					
COMMENTS:					
OTHER:	Alliance Title & Escrow Corp				0
ADDRESS:	1070 Riverwalk Drive Suite 100 Idaho Falls, ID 83402				
PHONE:	Work: (208) 524-5600 x	Fax:	Email:		
CONTACT:	Ron Romrell	Work: x		Email: ron_romrell@alliancetitle.cor	
REFERENCE:					
COMMENTS:					
ESCROW COMPANY:	Alliance Title & Escrow Corp.				2
ADDRESS:	1070 Riverwalk Dr., Suite 100 PO Box 50642 Idaho Falls, ID 83402				
PHONE:	Work: (208) 524-5600 x	Fax: (208) 524-1977	Email:		
CONTACT:	Mary L. Bruggenkamp	Work: (208) 524-5600 x333		Email: mary_bruggenkamp@alliance	
REFERENCE:	3030818277MLB				
COMMENTS:					
TITLE COMPANY:	Alliance Title & Escrow Corp.				1
ADDRESS:	1070 Riverwalk Dr., Suite 100 PO Box 50642 Idaho Falls, ID 83402				
PHONE:	Work: (208) 524-5600 x	Fax: (208) 524-1977	Email:		
CONTACT:	Corrinna Schnepf	Work: x		Email: corrinna_schnepf@alliancetit	
REFERENCE:	3030818277CS				
COMMENTS:					

TOTAL COPIES: 4

Date: February 19, 2008 Time: 11:46AM Page No.: 1
Title Order Nbr.: 3030818277CS Escrow Nbr.: 3030818277MLB

Alliance Title & Escrow Corp.
ORDER FOR TITLE INSURANCE

Sales Price:		**Open Date:**	2/14/2008
Loan Amt:	$1,100,000.00	**Opened By:**	Randi Farmer
Escrow Officer:	Mary L. Bruggenkamp	**Promised Date:**	2/15/2008
Phone Nbr.:	(208) 524-5600 Ext. 333 **Fax:**	**Est. Closing Date:**	2/21/2008
Title Type:	Owners	**Escrow Type:**	Conventional Resale

TYPE OF POLICY	LIABILITY AMOUNT

LEGAL DESCRIPTION:

Subdivision:					
County:	Bonneville	State:	ID	Township:	3n
Lot:		Block:		Map Nbr:	
Section:	31	Range:	38	Filing Date	
Book:		Page:		Plat Nbr	
Unit:		Building Nbr:		Tract Nbr:	
Abstract Nbr:		Judicial Dist		Arb Nbr:	
Cert Nbr:		Doc Nbr:		Ins Nbr:	

Portion:
Parcel Nbr(s): rpo3n38e310048

2. 202528 fax to Ordered by L.O. 2-19-08 mw

PROPERTY ADDRESS: 6371 N 5th E
Idaho Falls, ID 83401
PROPERTY TYPE: Land Only
SPECIAL INSTRUCTION:

INTERESTED PARTIES:						COPIES
BUYER:	Teton Valley Golf Associates, LP					0
ADDRESS:	PO Box 77 Victor, ID 83455					
PHONE:	Work: x	Home:		Fax:		
SSN:						
COMMENTS:						
SELLER:	Darold D. White					0
ADDRESS:	6371 N 5th E Idaho Falls, ID 83401					
PHONE:	Work: x	Home:		Fax:		
SSN:						
COMMENTS:						
PRIM. CUSTOMER:	Idaho Development LLC					0
ADDRESS:	2192 Preston St Salt Lake City, UT 84106					
PHONE:	Work: x	Fax:		Email:		
CONTACT:	Melinda Boswell	Work: x			Email:	
REFERENCE:						
COMMENTS:						

MELINDA BOSWELL
IDAHO DEVELOPMENT, LLC
2192 Preston Street
SALT LAKE CITY, UTAH 84106

February 12, 2008

Escrow Instruction

To: Mary Bruggenkamp, Escrow Officer
Alliance Title & Escrow
1070 Riverwalk Drive
Idaho Falls, ID 83402

From: Idaho Development, LLC,
Attn: Melinda Boswell

Sent via facsimile

Re: Borrower: Teton View Golf Estates, LLC
Address: 6371 N. 5th S., Idaho Falls, ID
Tax Serial # RP03N38E31

YOU ARE DIRECTED AS FOLLOWS:

1. Upon receipt of the sum of $100,000, anticipated to occur on or before February 15, 2008 you are directed to hold the sum of $50,000 for Ameri-Title, (208) 524-6600, Attn: Jeannee Nangle, to be held for closing on behalf of seller, Zundel. The remaining sum of $50,000 shall be wired to KeyBank, under the account title, Rothchild Properties, LLC. Wiring Instructions shall be separately provided.

2. Prepare a closing statement, Trust Deed, and Trust Note. Please label "commercial loan". The note shall bear interest at 6% on a 30 year amortization with a 90 day call provision, at which time the entire unpaid balance, including interest, if called is payable in full. Payment should be mailed to the above indicated address.

3. The borrower shall pay all closing costs in regard to this financing, except as otherwise provided in the RepC.

4. Indicate 6 origination points on the gross loan amount. Of this amount, 3 origination points shall be paid to Melinda Boswell; 1.5 origination points shall be payable to David C. Clark ; and 1.5 origination points shall be payable to St. Charles Group, Inc.

LOCATION: BY TIME

5. Issue a lender's title policy insuring Idaho Development, LLC and assigns for the principal loan amount in the net loan amount of $1,100,000. in addition to Closing Costs, against a First Deed of Trust position on the above referenced real property in Idaho Falls, Utah, known as tax serial # RP03N38E310048. Beneficiary shall be Idaho Development, LLC; Trustor shall be Teton View Golf Estates, LLC; and Trustee shall be Alliance Title & Escrow.

6. Prepare a Trust Note, which shall allow payment to Idaho Development, LLC of 15% net proceeds from each lot sale. In addition, in the event that the Note is not satisfied within the 90 day term, at borrower's option, it may enlarge the Note with Idaho Development, LLC, to ensure adequate funding for completion of the project. At a minimum, at borrower's option, Idaho Development agrees to leave the sum of $500,000 in the project and to then subordinate to any third party construction financing. Term of Note

7. Upon receipt of the additional wire of $1,000,000, anticipated to occur on or before February 20, 2008, and after recording the First Deed of Trust, you are directed to release the sum of $800,000 to Ameri-Title, Attn: Jeannee Nangle, to be released to her insured seller Zundel, upon receipt of a special warranty deed from Zundel in favor of Teton View Golf Estates, LLC. The remaining balance shall be released to Rothchild Properties, as per their wiring instructions.

8. The Trust Note shall have an additional release provision, allowing unencumbered conveyance of the 4.19 acres of commercial land to Rothchild Properties, LLC, upon the disbursement of the $800,000 payment to the seller, Zundel.

Idaho Development, LLC,

Melinda C Boswell

Melinda Boswell, Manager

ACCEPTANCE OF ESCROW INSTUCTION

I, Mary Bruggenkamp, acting as authorized agent for Alliance Title & Escrow, by my signature hereto, hereby accept the terms and conditions of the foregoing instruction and agree to follow and comply with the same.

Mary Bruggenkamp, Escrow Officer
Alliance Title & Escrow

ALLIANCE
TITLE & ESCROW CORP.

LOAN CLOSING INSTRUCTIONS

Date:
Escrow No. 3030818277MLB

To: Alliance Title & Escrow Corp..

I/We hand you herewith:

Proceeds of the loan(s) described below in the amount of **$1,100,000.00**

which you are authorized to use in connection with your above numbered escrow when you are able to close in accordance with the instructions below:

1. When you are in a position to issue your Title Insurance Policy in your usual form, containing the printed exceptions usual in such policies with your liability not to exceed **$1,100,000.00** on the real property described in your Title Commitment No. **3030818277LAC** which the undersigned have read and approved, which will show record title to said property vested in:
Teton View Golf Estates, LLC
in form and manner acceptable to lender herein provided for and Deed of Trust executed by
Teton View Golf Estates, LLC
for the payment of **$1,100,000.00** in favor of
Idaho Development LLC

Then you are instructed to disburse deposited funds pursuant to the Escrow Closing Statement examined and approved by the parties hereto and by this reference made a part hereof. Proceeds of this escrow may be disbursed by your check payable to the respective parties, and your checks and documents may be mailed to the address set forth in these instructions.

2. When all documents have been signed and you have received all necessary funds, you are authorized to record the necessary instructions, disburse funds collected in accordance with theses instructions and have the Title Insurance Policy issued. Adjustments may be made on interest, recordings fees and approved payment of bills received after the signing of these instructions. You are authorized to deduct from the undersigned's proceeds any additional interest due on loan payoffs to underlying lien holders after closing if a loan payoff is being made as a part of this transaction, and the undersigned agree to reimburse you for any charges incurred by you in connection with obtaining said payoffs or demands.

3. The undersigned's signatures on the new loan documents as presented by
Idaho Development LLC
shall be deemed their full and complete approval and understanding of the terms and conditions contained therein. The undersigned have reviewed and approved the legal description for use in the Deed of Trust to be recorded.

All money received by you in this escrow is to be deposited in your trust account pending closing. Borrower(s) hereby acknowledge and consent to the deposit of the escrow money in financial institutions with which Escrow Holder has or may have other banking relationships and further consent to the retention by and/or its affiliates of any and all benefits Escrow Holder, which may be received from such financial institutions by reason of their maintenance of said trust accounts. Unless otherwise specifically agreed, you may commingle funds received by you in escrow with escrow funds of others and may deposit such funds in a checking account with any federally insured bank. It is understood that you shall be under no obligation to invest funds deposited with you on behalf of any depositor, nor shall you be accountable to the depositor for any earnings or other incidental benefits attributable to the funds which may be received by you while you hold such funds

These instructions are effective for 14 days from date hereof; and, thereafter , without written instructions to continue, you are authorized and instructed to cancel this escrow. I/We, jointly and severally, agree to pay your cancellation fee and all charges in connection therewith. In the event of cancellation of this escrow, all funds, except loan funds, shall be held subject to written cancellation instructions executed by all principals involved.

These escrow closing instructions may be executed in counterparts with like effect as if all signatures appeared on a single copy.

You are instructed to furnish to any broker or lender identified with this transaction or anyone acting on behalf of such lender, any information concerning this escrow upon request of said broker or lender. If for any reason funds are retained or remain in escrow after closing date, you are to deduct therefrom a reasonable monthly charge as custodian thereof of not less than $10.00 per month.

ADDITIONAL INSTRUCTIONS
No closing costs are to be added to the net loan of $1,100,000.00
No transfer of 4.19 acres to Rothchild Properties, LLC upon the disbursement of $800,000. to seller, Zundel.
All origination points are to be paid at closing.
All funds remaining after disbursements for origination points, title and escrow fees and $800,000. to AmeriTitle shall be disbursed to Rothchild Properties, LLC.

NO LONG-TERM ESCROW COLLECTION
There shall be no long term escrow collection account established through this escrow for the collection of the note and Deed of Trust deposited herein. Escrowholder is instructed to forward all original documents, after closing, to the Beneficiary at the address provided, and thereafter shall have no liability or responsibility for same.

DECLARATION OF ESCROW SERVICES:

Borrower(s) hereby acknowledge the following by their signature(s) below:

I/We have been specifically informed that Alliance Title & Escrow Corp. is not licensed to practice law and no legal advice has been offered by Alliance Title & Escrow Corp. or any of its employees. I/We have been further informed that Alliance Title & Escrow Corp. is acting only as escrow holder and that it is forbidden by law from offering any advice to any party with respect to the merits of this escrow transaction or the nature and content of the documents executed herein, and that they have not done so.

We have been requested by Alliance Title & Escrow Corp. to seek legal and/or accounting counsel of our own choosing at our own expense, if we have any doubt concerning any aspect of this transaction.

I/We further declare all instruments to which we are a party, if prepared by Alliance Title & Escrow Corp. have been prepared under the direction of my/our attorney(s) or myself/ourselves. We have also been advised that we can obtain a copy of the privacy policy of Alliance Title & Escrow Corp by requesting it

I/We have been afforded adequate time and opportunity to read and understand these escrow instructions and all other documents referred to therein.

These escrow closing instructions constitute the entire agreement between Alliance Title & Escrow Corp. and the undersigned parties. Any amendment and/or supplement to these instructions must be in writing.

I/We further understand that Alliance Title & Escrow Corp. assumes no liability as to any law, ordinance or governmental regulations including, but not limited to, building, zoning and division of land ordinances and assumes no responsibility for determining that the parties to the escrow have complied with the requirements of the Truth in Lending, Consumer Protection Act (Public Law 90-321), or similar laws.

THE FOREGOING TERMS, CONDITIONS, CONSIDERATION AND INSTRUCTIONS ARE UNDERSTOOD AND APPROVED IN THEIR ENTIRETY BY THE UNDERSIGNED. I AGREE TO PAY ON DEMAND USUAL BORROWER'S CHARGES INCLUDING RECORDING FEES, SETTLEMENT FEES, TITLE POLICIES, UNPAID BALANCES OF ANY ENCUMBRANCES OF RECORD THAT IS TO BE ELIMINATED FROM THE TITLE COMMITMENT PRIOR TO THE CLOSING, DOCUMENT PREPARATION FEES AND LENDERS FEES PER THEIR INSTRUCTIONS.

Teton View Golf Estates, LLC

By: Tony M. Verstreg

ADDRESS:

The foregoing instructions have been acknowledged and received by Alliance Title & Escrow Corp.

Alliance Title & Escrow Corp.

By: _____ DATE: February 29, 2008

Teton View Golf Estates, LLC

By: Tony M. Verstteeg

ALLIANCE
TITLE & ESCROW CORP.

BUYER/BORROWER STATEMENT

Escrow Number: 3030818277MLB
Escrow Officer: Mary L. Bruggenkamp

Title Order Number: 3030818277LAC
Date: 02/29/2008 - 1:29:32PM
Closing Date: 02/21/2008

Buyer/Borrower: Teton View Golf Estates, LLC
Seller: ZBS, LLC
Property: 6371 N 5th E, Idaho Falls, ID 83401

TOTAL CONSIDERATION		
TITLE CHARGES		
Lender/Mortgagee Premium for 1,100,000.00: Chicago Title	2,980.00	
Mortgage Recording Fee: Alliance Title & Escrow Corp.	14.00	
ESCROW CHARGES TO: Alliance Title & Escrow Corp.		
Escrow Fee	500.00	
Wire Fee	60.00	
LENDER CHARGES		
New to Idaho Development LLC:		1,100,000.00
Origination Fee: Melinda Boswell	33,000.00	
Origination Fee: David C. Clark	16,500.00	
Origination Fee: St. Charles Group, Inc.	16,500.00	
ADDITIONAL DISBURSEMENTS:		
Purchase Funds Due To Seller: AmeriTitle	800,000.00	
Balance Of Proceeds: Rothchild Properties, LLC	230,446.00	
TOTALS	1,100,000.00	1,100,000.00

Teton View Golf Estates, LLC

By: _____

GiO

MARK R. FULLER (ISB No. 2698)
DANIEL R. BECK (ISB No. 7237)
FULLER & CARR
410 MEMORIAL DRIVE, SUITE 201
P.O. BOX 50935
IDAHO FALLS, ID 83405-0935
TELEPHONE: (208) 524-5400

ATTORNEY FOR DEPATCO, INC.

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF BONNEVILLE

IDAHO DEVELOPMENT, LLC., a Utah limited liability company,

Plaintiff,

v.

TETON VIEW GOLF ESTATES, LLC., a Utah limited liability company, ROTHCHILD PROPERTIES, LLC., a Utah limited liability company, WESTERN EQUITY, LLC., A Utah limited liability company, AMERITITLE COMPANY; ZBS, LLC., an Idaho limited liability company, DEPATCO, INC., an Idaho corporation, SCHIESS & ASSOCIATES, P.C., an Idaho Professional Service Corporation, HD SUPPLY WATERWORKS, LTD., DOES 1-3, and ALL PERSONS IN POSSESSION OF REAL PROPERTY DESCRIBED HEREIN,

Defendants.

Case No. CV-08-4395

DEPATCO'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

COMES NOW the Defendant, DePatco, Inc., ("DePatco"), through Mark R. Fuller of Fuller & Carr Law Office, and files this Reply in Support of DePatco's Motion for Partial Summary Judgment.

ARGUMENT

I. THE UNDISPUTED FACTS ESTABLISH THAT THE TRANSACTION WAS AN INVESTMENT AND NOT A LOAN

Ms. Boswell testifies that she was given two options prior to giving the $1,100,000 to Teton View: (1) loan Mr. Spafford money to purchase some land in Idaho, or (2) partner up. *See* Affidavit of Melinda Boswell, para. 2. If the transaction was a loan, Ms. Boswell would be a bona fide creditor and she would be paid interest and receive her money back within three (3) months. *Id.* If she chose to partner up, Ms. Boswell would be an investor but she **"could make more money than just interest."** *Id.* (Emphasis Added). "While the creditor anticipates repayment of a fixed debt, the investor anticipates a potentially unlimited share of future profits... In exchange for this 'unique right to participate in the profits,' the investor risks the loss of his capital investment..." *In Re SeaQuest Diving, LP,* 579 F.3d 411 (5th Cir. 2009). (quoting *In Re Granite Partners,* 208 B.R. 332 (S.D.N.Y. 1997).

The option Ms. Boswell chose is evidenced by the Joint Venture Agreement she **signed** on behalf of Idaho Development. The Joint Venture Agreement provides: "The parties desire to **conduct a business enterprise together** to be known as Teton View Golf Estates, LLC, a Utah Limited Liability Company." *See* Joint Venture Agreement, Recitals. None of the true creditors, such as ZBS, DePatco, Schiess, or HD Waterworks were given any ownership interest in Teton View or right to its profits. Plaintiff correctly

states that if Idaho Development and Rothchild were partners "...then there would be no need for a deed of trust or a second deed of trust on the amount subordinated—a 33.3% interest would have been sufficient." *See* Plaintiff's Response, pg. 9. There was no need for a Deed of Trust specifically because Idaho Development chose to "**partner up**."

Mrs. Boswell wanted a higher return than she would get from a short term loan and chose instead to become an investor under an agreement where she would get 100% of the first $1,100,000 in profits and then a 33.3% share in any further profits. The facts set forth in the record, including the Affidavits of Melinda Boswell, the Joint Venture Agreement, the Escrow Instructions, and the Promissory Note, all clearly establish that Ms. Boswell chose to "partner up" and become an investor in the business. If her interest is not treated as an equity contribution or subordinated, Ms. Boswell, through Idaho Development, will recover the remainder[1] of Idaho Development's investment before any legitimate creditor (who did not "partner up") gets any payment for the services and materials they provided to Teton View's project.

Plaintiff relies heavily on the 13 factors set forth by the 10th Circuit Court in *In re Hedged-Investments Associates, Inc.*, 380 F.3d 1292, 1297 (10th Cir. 2004). *See* Plaintiff's Response, pg. 7-17. Review of those 13 factors establishes that the transaction was an equity contribution so that Idaho Development and Rothchild Properties could conduct business together as owners, not creditors.

(1) *Names given to the Certificates Evidencing the Indebtedness*

[1] Idaho Development has already received back at least $75,000 of its initial investment. *See* Idaho Development's Amended Complaint, para. 23. Melinda Boswell, personally, also received $33,000 (3 points) from the transaction. *See* Amended Escrow Instructions, attached as Exhibit A to the Affidavit of Melinda Boswell.

In this case, there are two opposing sets of documents. First, there is a Joint Venture Agreement, signed by Melinda Boswell on behalf of Idaho Development. A Joint Venture Agreement would not be signed by anyone if the transaction was a loan. None of the true creditors "partnered up" by signing the Joint Venture Agreement. There is no dispute that the Joint Venture Agreement provides that the "joint venture was formed to provide investment capital and active participation." *See* Plaintiff's Response, pg. 8. The Joint Venture Agreement was entered into because "[t]he parties desire to conduct a business enterprise together..." *See* Joint Venture Agreement, Recitals. These facts establish that Idaho Development intended to be an investor in the project. While there is a "Promissory Note" purportedly secured by a "Deed of Trust", which indicates that Idaho Development sought to camouflage the transaction as a loan, because of the conflicting sets of documents, this factor is inconclusive in determining the true nature of the transaction. This is not the case with the other 12 factors.

(2) The Presence or Absence of a Fixed Maturity Date

The Joint Venture Agreement contains no language fixing a date for payments to be made to Idaho Development. Instead, the Joint Venture Agreement specifically makes payments contingent upon funding of a construction loan and future lot sales. *See* Joint Venture Agreement, Section II. Likewise, the due date in the Promissory Note is not fixed and is instead contingent. The Promissory Note provides that the principle and interest are due after 90 days only "**if note is called due.**" *See* Promissory Note, attached as Exhibit B to the Affidavit of Mark Fuller. (Emphasis Added). The Escrow Instructions issued by Idaho Development also stated that the unpaid balance was due "...if called..." *See* Amended Escrow Instruction, attached as Exhibit A to the Affidavit of Melinda

Boswell. The Promissory Note provides: "in the event the Note is not satisfied within the 90 day term **at borrower's option**, it may enlarge the Note with Idaho Development, LLC, to **insure adequate funding for completion of the project**." *Id.* (Emphasis Added). Idaho Development's Escrow Instructions contain similar language: "...in the event that the Note is not satisfied within the 90 day term, **at borrower's** option, it may enlarge the Note with Idaho Development, LLC, to ensure adequate funding for completion of the project." *See* Amended Escrow Instructions, attached as Exhibit A to the Affidavit of Melinda Boswell. Because the maturity date was contingent and was subject to modification at Teton View's option, to ensure funding for completion of the project, this factor supports a finding that the transaction was an capital contribution, not a bona fide loan.

(3) The Source of Payment

The only source of repayment specifically identified was from lot sales. The Joint Venture Agreement does provide that "upon the funding of the construction loan" Idaho Development will be entitled to a payment of $800,000. *See* Joint Venture Agreement, para. II. However, the Joint Venture Agreement does not identify the construction loan as the source of that payment. The Joint Venture Agreement does specifically state that Idaho Development "shall be repaid the balance of its investment under a lot release formula..." *Id.* The Promissory Note also does not identify the construction loan as the source of any repayment of the $1,100,000. *See* Promissory Note. Instead, the Promissory Note specifically provides for a small monthly payment, and "Note provides for payment to Idaho Development, LLC 15% net proceeds from each lot sale." *See* Promissory Note. Clearly, Teton View was expecting to sell enough lots within the first 90

days in order to generate sufficient profit to repay ZBS, and also have enough equity in the property to obtain a significant construction loan which could then be used to carry the project forward. But both the Promissory Note and the Joint Venture Agreement made payments to Idaho Development contingent on the funding of a construction loan specifically "to insure adequate funding for the completion of the project." *See* Promissory Note. If no construction loan could be obtained, Idaho Development's withdrawal of all of the capital of the business would ensure the business's failure. Essentially, Teton View was set up so that Idaho Development got all of the profits until Idaho Development had received $1,100,000 and after that point, Idaho Development would continue to get 33.3% of the profits. Because the only identified source of payments was earnings of the company, analysis of this factor supports a finding that the transaction was a capital contribution, meant to be recovered out of the profits of the company and not a bona fide loan.

(4) The Right to Enforce Payment of Principal and Interest

Idaho Development did not have a right to enforce payment of the principle. The Joint Venture Agreement is not ambiguous and clearly provides that any repayment is contingent on Teton View obtaining a construction loan and on lot sales. *See* Joint Venture Agreement, Section II. Likewise, the Promissory Note provides that at Teton View's option the Note can be enlarged "to insure adequate funding for the completion of the project." *See* Promissory Note.

Idaho Development asserts that under DePatco's interpretation the Joint Venture Agreement, the Promissory Note, and the Deed of Trust contradict one another. *See* Plaintiff's Response, pg. 11. The Promissory Note clearly provides that Teton View may

enlarge the note, at its option, and that Idaho Development agrees to leave **a minimum of** $300,000[2] in the project to ensure adequate funding to complete the project. *See* Promissory Note. Consistently, the Joint Venture Agreement makes the initial payment of $800,000 to Idaho Development **contingent upon** receipt of a construction loan, and requires the remaining amount be subordinated to construction financing. *See* Joint Venture Agreement. The Escrow Instructions issued by Idaho Development also provide: "**At a minimum,** at borrower's option, Idaho Development agrees to leave the sum of $300,000 in the project and to then subordinate to any third party construction financing." *See* Amended Escrow Instructions, attached as Exhibit A to the Affidavit of Melinda Boswell. (Emphasis Added). While the Deed of Trust does state that "further loans" shall be optional for Idaho Development, the Deed of Trust **does not state** that enlargement of the existing loan is optional for Idaho Development. These documents do not contradict one another and can all be read consistently to establish that the intent of the parties was for Idaho Development to provide an investment, where recovery of the investment and payment of future profits would be contingent upon the success of the business.

(5) Participation in Management Flowing as a Result

Prior to the transaction, Idaho Development had no ownership in Teton View and no rights with regard to managing Teton View. Teton View was established specifically for Idaho Development and Rothchild Properties to conduct business together as partners. *See* Joint Venture Agreement. As an integral part of the transaction, Idaho Development acquired a 1/3 ownership interest in Teton View, and while its participation and

[2] While the Promissory Note states $500,000, it appears and DePatco does not dispute that based upon the language in the Joint Venture Agreement, Idaho Development's Escrow Instructions, and Boswell's Affidavit, the $500,000 number is a typographical error.

management is alleged to have been minimal, it was a definite increase from having no involvement in the business. This factor also establishes that the transaction was a capital contribution to purchase an ownership interest in a business, rather than a loan.

(6) The Status of the Contribution in Relation to Regular Corporate Creditors

The Joint Venture Agreement does not identify any security for the initial payment of $800,000 and there is no dispute that the remaining $300,000 (which was to be secured by a Deed of Trust) would be subordinated to a construction loan. *See* Joint Venture Agreement. Furthermore, the Promissory Note provides that **"At a minimum**, at borrower's option, Idaho Development agrees to leave the sum of $300,000 [sic] in the project and **to then subordinate to any third party construction financing**." Idaho Development's Escrow Instructions also indicate that Idaho Development agreed to leave a **minimum** of $300,000 in the property, at Teton View's option, to ensure adequate funding to complete the project. *See* Amended Escrow Instructions, para. 6, Attached as Exhibit A to the Affidavit of Melinda Boswell. Structuring the agreements this way ensured that Idaho Development would be entitled to profits of $1,100,000 out of the business before Rothchild obtained any profits. However, it is clearly treats Idaho Development as an owner of the business whose interest is subordinated to the claims of third party creditors. This is exactly what two owners of a business would do in order to assure that one owner received a certain amount of profits before the other owner was entitled to any profits, without affecting the rights of bona fide creditors. Analysis of this factor also requires a finding that the transaction was a capital contribution and ownership acquisition and not a bona fide loan.

(7) The Intent of the Parties

The intent of the parties is clearly set forth in the joint venture agreement and confirmed in Melinda Boswell's affidavit. "The parties desire to conduct a business enterprise together to be known as Teton View Golf Estates, LLC, a Utah Limited Liability Company." *See* Joint Venture Agreement, Recitals. "Mr. Spafford said I could make **more money than just interest** if I would subordinate $300,000 of the money I was giving and **partner up**." *See* Affidavit of Melinda Boswell, para. 2. The Joint Venture Agreement, signed by Boswell, provides for Idaho Development to "contribute" the $1,100,000 and provides that her "investment" will be repaid according to a lot release formula. Boswell (and her company Idaho Development) chose to be an investor in Teton View with the right to the first $1,100,000 in profits from lot sales and 33.3% profits after that amount had been received. Had the project gone as initially planned, Boswell would have no doubt recouped her investment and made a substantial sum of money, well in excess of the interest she would have made if she had just loaned Mr. Spafford money for three months. Boswell chose higher risk for the potential of a higher return. While the deal turned out poorly because no lot sales were made and the business has failed miserably, this does not make her a secured creditor with first priority on the business's only asset.

(8) "Thin" or adequate capitalization

There was **not adequate** capitalization of the business. "In exchange or this 'unique right to participate in the profits,' the investor risks the loss of his capital investment, which provides an 'equity cushion' for the repayment of creditor's claims." *In Re SeaQuest Diving, LP,* 579 F.3d 411 (5th Cir. 2009). The Joint Venture Agreement provides "Idaho Development, LLC is to initially contribute One Million One Hundred Thousand Dollars ($1,100,000) to the joint venture..." *See* Joint Venture Agreement. No

other contributions were made by any other party. *Id.* Because of this there was no equity cushion for any bona fide creditors.

Melinda Boswell testified that "[a]fter the formation of Teton View, a checking account was opened with around $100,000 in the account for operating expenses." *See* Affidavit of Melinda Boswell, para. 9. Idaho Development argues that this was a cushion for the foreseeable creditors at the time of the *inception* of the business. *See* Plaintiff's Response, pg. 13. However, there is no dispute that Teton View had an obligation to pay $400,000 to ZBS approximately 45 days after the business was formed. *See* Affidavit of Melinda Boswell, para. 12. In addition, if Idaho Development's argument is accepted, Teton View owed Idaho Development $1,100,000 within 90 days of the business being formed. In addition, Teton View had other creditors who were to be paid out of the initial $100,000 put in the account for operating expenses. *See* Plaintiff's Response, pg. 12. An entity which has in excess of $1,500,000 due within 90 days (even assuming DePatco and other bona fide creditors never got involved) does not have an adequate cushion to protect existing and potential creditors by having a mere $100,000 in the bank.

Idaho Development argues that "When Teton View received the money from Idaho Development, Teton View's creditors were ZBS and others who were to be paid from the operating capital." *See* Plaintiff's Response, pg. 12. *See also* Affidavit of Melinda Boswell, para. 9. If the $1,100,000 is treated as a capital contribution, then there is sufficient equity in the business to protect existing and future creditors of the business. If the $1,100,000 is treated as a loan, then the cushion was completely illusory, and the entire business was simply set up as a scam where it appeared the business had capital at its inception so that a bank or other creditor could be duped into funding the company by way of a

construction loan. This factor clearly weighs heavily in favor of the Court finding the transaction to be a capital contribution.

(9) Identity of Interest Between Creditor and Stockholder

Idaho Development used the $1,100,000 investment to obtain its ownership interest in Teton View Development. *See* Joint Venture Agreement. In exchange Idaho Development was entitled to the first $1,100,000 in profits and 33.3% of all profits thereafter. *See* Joint Venture Agreement and Promissory Note. Furthermore, Idaho Development also received an ownership interest in the very real estate which Idaho Development is now trying to sell by foreclosure. *See* Joint Venture Agreement, Section V. ("The interest of each party in the subject property shall be proportionate to his or her share of the profits in the venture.").

Plaintiff argues that under the reasoning of *Estate of Mixon*, the transaction was indicative of a loan because "it is unreasonable to believe Rothchild's time, labor, and know how were anywhere equal to the amount of money Idaho Development put up to purchase the property." *See* Plaintiff's Response, pg. 14. However, *Estate of Mixon's* is distinguishable because in that case the contributions came from existing stockholders of a company that had been in business for a substantial amount of time. In this case, the transaction was for Idaho Development to purchase its interest in Teton View. *See* Joint Venture Agreement.

Because Idaho Development purchased an ownership interest in Teton View, and the accompanying right to profits, and also acquired an ownership interest in the subject property itself, the transaction must be viewed as a capital contribution and not a loan.

(10) Source of Interest Payments

Because Teton View had no capital other than the $1,100,000 invested by Idaho Development, and had no income, the only source of interest payments would be the $1,100,000 itself. While Idaho Development apparently did receive interest for three months, Idaho Development also recognizes that it would "receive some of the earnings, as lots are sold." *See* Plaintiff's Response, pg. 15. A true lender would not receive principal, interest and 33.3% profits from the company's earnings. The 33.3% profits from the company had the potential to give Idaho Development a much higher return than 6% annual interest from a true loan. This factor also supports a finding that the transaction was a capital contribution and not a loan.

(11) The Ability of the Corporation to Obtain Loans From Outside Lending Institutions

The Affidavits of Melinda Boswell and David Clark establish that Teton View did not have the ability to obtain loans from outside lending institutions. Idaho Development does not dispute that the facts pertaining to this factor supports a finding that the transaction was a capital contribution. *See* Plaintiff's Response, pg. 17. Nor would any reasonable lender provide a construction loan to a project where the construction loan would be used not to improve the property, but to pay $800,000 to the initial investor of the company and $640,000 to initial seller of the property. Telling a bank that the "construction loan" would be used for construction in this instance would simply be fraudulent.

(12) The Extent to Which the Advance was Used to Acquire Capital Assets

Idaho Development does not dispute that the money obtained by Teton View in the transaction was used to purchase capital assets. *See* Plaintiff's Response, pg. 15.

Idaho Development does not dispute that the facts pertaining to this factor indicate the transaction was a capital contribution. *See* Plaintiff's Response, pg. 17. In addition, a significant amount of the money was funneled back to Melinda Boswell, the sole owner of Idaho Development. *See* Amended Escrow Instructions, attached as Exhibit A to the Affidavit of Melinda Boswell; *See also* Buyer/Borrower Statement, Final Page of Exhibit D to the Second Affidavit of Alan Harrison. ("Origination Fee: Melinda Boswell: [$]33,000.00")

(13) The Failure of the Debtor to Repay on the Due Date or to Seek a Postponement

While Teton View apparently did seek a one month postponement, it is undisputed that Teton View failed to repay the debt on the new "due date," or any date thereafter. This factor supports a finding that the transaction was a capital contribution, and not a loan.

When the documents signed by the parties are reviewed, it is obvious that Idaho Development was an investor who obtained an ownership interest in the business in exchange for its investment. This transaction was an investment by Idaho Development, requiring Idaho Development to "partner up" with Rothchild Properties, and entitling Idaho Development to potential profits far beyond its original investment. The Joint Venture Agreement, which Melinda Boswell signed as the representative of Idaho Development, is clear that the $1,100,000 was a "contribution" meant to be an "investment." This unambiguous language and the fact that the $1,100,000 was used by Idaho Development to acquire investor's rights to profits should not be ignored simply because Idaho Development was also given a baseless $850,000 amended deed of trust.

II. EVEN IF THE TRANSACTION IS CHARACTERIZED AS A LOAN, IDAHO DEVELOPMENT'S SECURITY SHOULD BE EQUITABLY SUBORDINATED

The Court should consider the conduct and knowledge of Teton View and its managers in determining whether the "loan" should be subordinated to DePatco's lien claim which is now reduced to judgment. In *Nerox Power Sys. V. M-B Contr. Co.,* the Alaska Supreme Court held "[t]he issue is not whether those listed as beneficiaries in the deed of trust acted inequitably but rather whether those who recorded the deed did." 54 P.3d 791, 800 (Alaska 2002). Thus the Court should look at the conduct of Teton View, through its managers and owners, in determining whether there is inequity or unfairness. When considering the conduct of Mr. Spafford, Mr. Versteeg, and Ms. Boswell, as a whole it is clear that there is substantial unfairness and that Ms. Boswell was aware of and participated in the unfairness to a degree sufficient to require Idaho Development's Deed of Trust to be subordinated to DePacto's lien claim. "The general rule which imputes an agent's knowledge to the principal is well established." *Temperance Insurance Exchange v. Coburn,* 85 Idaho 477, 480 (1963)(quoting *Mutual Life Insurance Co. v. Hilton-Green,* 241 U.S. 613, 36 S.Ct. 676, 680, 60 L.Ed. 1202 (1916).

Boswell had Mr. Spafford form Idaho Development and Teton View, and had Mr. Spafford draft all of the documents related to the transaction. *See* Affidavit of Melinda Boswell, para. 3. Tony Versteeg, was selected by Idaho Development and Rothchild Properties as the agent and manager responsible for day-to-day operations of the Joint Venture. *See* Joint Venture Agreement. Boswell testified that "Mr. Spafford and Mr. Versteeg were governing the day to day affairs of Teton View **and would report to me** they had various loans in the works.They would indicate what bills needed to be paid and

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I signed some of the checks to pay these bills." *See* Affidavit of Melinda Boswell, para. 10 (Emphasis Added).

There is no dispute that "Teton View, through Mr. Versteeg as manager, signed a Bid Proposal from DePatco, Inc., to provide the water, sewer, and road system for the project." *See* Affidavit of Melinda Boswell, para. 15. There is also no dispute that "Teton View had no ability to pay a contractor such as DePatco without a construction loan." *See* Plaintiff's Response, pg. 5.By the time DePatco entered into the contract on June 18, 2008 (Exhibit B to the Harrison Affidavit), Teton View had already failed to make the $400,000 payment to ZBS (which was due April 15, 2008) and the $800,000 payment allegedly due to Idaho Development (which was purportedly due May 28, 2008). *See* Plaintiff's Response pg. 5. Idaho Development acknowledges that "Idaho Development was aware DePatco started work on the property." *See* Plaintiff's Response, pg. 9. The record is silent as to any effort by Idaho Development to prevent DePatco from providing services and materials on the project.

The unfairness of Ms. Boswell's position is made evident by her affidavit. Ms. Boswell admits that even though repayment of principal and interest "...seemed like a good return on my money...," she desired "more money that just interest." *See* Melinda Boswell Affidavit, para. 2. Ms. Boswell admits that "[t]he 33.3% interest in Teton View was supposed to be a kind of an added bonus for partnering up..." *See* Melinda Boswell Affidavit, para. 5.Yet, it is Ms. Boswell's position that "**[s]he was not intending to place $1,100,000 at risk.**" *See* Plaintiff's Response, pg. 6. (Emphasis Added). "[T]he limited personal liability of shareholders **does not come free**...Proper capitalization might be envisioned as the principal prerequisite for insulation of limited liability." *Hanewald &*

Sons, Inc. et al v. Bryan's Inc., et al., 429 N.W.2d 414 (N.D. 1988).

In addition, Idaho Development's Amended Escrow Instructions provided "...3 origination points shall be paid to Melinda Boswell;" *See* Amended Escrow Instructions, attached as Exhibit A to the Affidavit of Melinda Boswell. The 3 origination points amounted to $33,000. *See* Buyer/Borrower Statement, Last Page of Exhibit D to the Second Affidavit of Alan Harrison. This payment was made when Teton View had no capital cushion to protect existing and potential creditors because it is undisputed that if the $1,100,000 is a loan, then no capital contributions were made to the company. *See* Idaho Development's Responses to Request for Admission, No. 5 and Explanation in Reponse to Interrogatory No. 9, attached as Exhibit C to the Affidavit of Mark Fuller. Ms. Boswell does not claim that she provided any services to Teton View, and instead acknowledges that the documents were all prepared by Mr. Spafford. *See* Affidavit of Melinda Boswell, para. 3. The Joint Venture Agreement does not provide for any compensation to be paid to Boswell or for Ms. Boswell to provide any services. *See* Joint Venture Agreement. Teton View's Articles of Organization also do not provide for Boswell to provide any services or receive any compensation. *See* Articles of Organization for Teton View, attached as Exhibit D to the Affidavit of Mark Fuller. The only document the $33,000 payment made directly to Boswell was provided for, is in Idaho Development's Amended Escrow Instructions. Boswell's receipt of these funds, when Teton View was grossly undercapitalized, without providing any services, and without placing anything at risk, establishes the inequitable nature of Boswell's security interest.

When Idaho Development agreed to the joint venture with Rothchild Properties and formed Teton View, Idaho Development chose the benefits of a corporation, which

include limited liability and potential for unlimited profits, yet if Idaho Development's deed of trust is not subordinated, Idaho Development obtained those benefits without having put anything at risk. This conduct is inequitable and should not be allowed.[3] DePatco respectfully requests that the Court subordinate any secured position Idaho Development may claim in the subject property to the lien claim of DePatco.

CONCLUSION

The Joint Venture Agreement clearly provides that the transaction, whereby Idaho Development invested $1,100,000 in Teton View for the purchase of the subject property, was a contribution to capital as an investment, entitling Idaho Development to Teton View's profits. The undisputed evidence clearly establishes the nature of the transaction between Idaho Development and Teton View as a capital contribution and not a loan by a bona fide creditor. Therefore, there is no valid debt secured by the February 29, 2008 Deed of Trust or the March 7, 2008 Amendment to the Deed of Trust, and Idaho Development is not entitled to repayment of its investment in Teton View until after Teton View's bona fide creditors have been paid.

However, if the Court determines that the transaction between Idaho Development and Teton View was a loan, the Court should subordinate Idaho Development's claim to DePatco's materialman's lien because Teton View was grossly undercapitalized from the first day of its existence, and Idaho Development knew that DePatco started working on the project at a time when Teton View had no possibility of paying for DePatco's work.

DePatco respectfully requests that the Court find as a matter of law and Order that

[3] DePatco is not arguing that Idaho Development has no claims and no rights, simply that Idaho Development is entitled to the rights of an owner/investor in Teton View and not the rights of a creditor.

DePatco's lien claim in the property is superior to any right and interest in the property held by Idaho Development, whether Idaho Development is an owner or a creditor. No genuine issues of material fact prevent partial summary judgment in favor of DePatco on either re-characterization or equitable subordination.

DATED this 1 day of February, 2010.

Mark R. Fuller
Attorney for DePatco, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and correct copy of the following described pleading or document on the persons listed below on this 1 day of February, 2010

Document Served: DEPATCO'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

IDAHO DEVELOPMENT, LLC, Plaintiff, -vs.- TETON VIEW GOLF ESTATES, LLC, et al, Defendants.	)	Case No. CV-2008-4395 **MINUTE ENTRY**

On February 8, 2010, at 11:30 AM, a Motion for Partial Summary Judgment came on for hearing before the Honorable Jon J. Shindurling, District Judge, sitting in open court at Idaho Falls, Idaho.

Ms. Nancy Marlow, Court Reporter, and Ms. Grace Walters, Deputy Court Clerk, were present.

Mr. Alan Harrison appeared on behalf of plaintiff.

Mr. Mark Fuller appeared on behalf of defendant, Depatco. Mr. Karl Decker appeared on behalf of defendant, ZBS, LLC. Mr. Jeffrey Brunson appeared on behalf of defendant, Schiess and Associates, PC.

Mr. Mark Fuller presented argument on the Motion for Part Summary Judgment.

Mr. Brunson joined into the argument on the Motion for part summary judgment.

Mr. Decker joined in with the same argument with the same equality of all parties.

Mr. Harrison argued in opposition to the Motion for part summary judgment, stating that Idaho Development is a creditor. Idaho Development should be granted summary judgment in its favor.

Mr. Fuller rebutted the opposition argument and requested that Ms. Boswell's claims be found to be an investor's claims.

Mr. Decker rebutted the opposition argument and ZBS did not subordinate any claims in this matter.

The Court will restrict its decision as to Idaho Development. The matter will be taken under submission and issue a ruling in due time.

Court was thus adjourned.

JON J. SHINDURLING
District Judge

c: Alan Harrison
Mark Fuller
Karl Decker
Jeffrey Brunson

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

IDAHO DEVELOPMENT, LLC, a Utah limited liability company,

Plaintiff,

v.

TETON VIEW GOLF ESTATES, LLC, a Utah limited liability company; ROTHCHILD PROPERTIES, LLC, a Utah limited liability company; WESTERN EQUITY, LLC, a Utah limited liability company; AMERITITLE COMPANY; ZBS, LLC, an Idaho limited liability company; DEPATCO, INC., an Idaho corporation; SCHIESS & ASSOCIATES, P.C., an Idaho professional services corporation; HD SUPPLY WATERWORKS, LTD.; DOES 1-3, and ALL PERSONS IN POSSESSION OF REAL PROPERTY DESCRIBED HEREIN,

Defendants.

Case No. CV-08-4395

OPINION, DECISION, AND ORDER ON DEFENDANT DEPATCO'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I.
FACTUAL AND PROCEDURAL BACKGROUND

This case stems from a land development deal gone awry. In December 2007, Melinda Boswell's father passed away, leaving her an inheritance of over a million dollars. In early 2008, Ms. Boswell met with David Clark and Lynn Spafford to discuss loaning money to Mr. Spafford in order to finance land development in Idaho.

To facilitate the loan and land development, Ms. Boswell formed Idaho Development, LLC and Mr. Spafford—along with Tony Versteeg in the form of Rothchild Properties, LLC—joined with Idaho Development to form Teton View Golf Estates, LLC; all the corporations were incorporated in Utah. Idaho Development holds a 33.3% membership share in Teton View, Rothchild Properties' share is 66.6%.

On February 28, 2008, Teton View issued a promissory note promising to repay Idaho Development $1,100,000. The note was secured by a deed of trust to property in Bonneville County. On March 7, 2008, the deed of trust was amended to $850,000. The terms of the note called for six percent annual interest with monthly payments of $5,595.06, though the balance of principal and interest was due no later than 90 days from the date of the note.[1] The deed of trust indicated the full payment was due on May 28, 2008. The note also provided for Idaho Development to receive 15% of net proceeds from each lot sale and for Idaho Development to leave $500,000 in the project subordinated to any third-party construction financing.[2] Idaho Development contends that the money to be subordinated was to be secured by a new note and deed of trust once a construction loan was obtained.

Teton View failed to satisfy the note on May 28, 2008. Instead, the parties negotiated a $10,000 payment in order for Idaho Development to extend the note an additional month. The month came and went without payment. On July 22, 2008, Idaho Development filed this lawsuit seeking the $1,120,246.59 due on the note. Idaho Development

On March 18, 2009, this court entered an order of default and default judgment against Teton View, Rothchild Properties, and Western Equity.

[1] The promissory note contains a discrepancy on this point: "Monthly payments of Five Thousand Five Hundred Ninety five and 06/100ths Dollars ($6,595.06)." Where words and figures in a contract are inconsistent, the words govern. 17A C.J.S. *Contracts* § 326

2 Idaho Development claims the note is in error and the parties agreed for Idaho Development to subrogate $300,000. The Joint Venture Agreement reflects this and lists the amount to be subrogated as $300,000.

On March 24, 2009, Mr. Versteeg and Mr. Spafford filed an answer and complaint on behalf of Western Equity, Rothchild Properties, and Teton View. The complaint and counter complaint accused Ms. Boswell of slander, breach of contract, interference with prospective economic advantage, and false utterance of negotiable instrument. The complaint also sought $3.6 million in punitive damages.

On April 15, 2009, DePatco filed its cross claim against Teton View for breach of contract and related claims. DePatco also sought an equitable subordination of Idaho Development's claims, foreclosure of its lien, and a determination of the priority of creditors against Teton View.

On April 23, 2009, HD Supply Waterworks filed its claims seeking foreclosure of its lien, damages from DePatco, and naming Daniel Stoddard and Sandra MacArthur as third-party defendants.

On April 28, 2009, Schiess and Associates filed its claims, seeking foreclosure of its lien, damages from Teton View and DePatco, and naming Jim Zundel and Brad Zundel as third-party defendants.

On June 17, 2009, ZBS filed its answer and claims, seeking foreclosure of its lien and damages from Teton View. ZBS also named Alliance Title & Escrow Corp. and Idaho Title and Trust, Inc., as third-party defendants.

On August 18, 2009, this court adopted a stipulation to dismiss most of the claims between Idaho Development and Rothchild and Western Equity.

On December 1, 2009, this court dismissed all claims by and against HD Supply Waterworks.

On December 11, 2009, this court granted DePatco's motion for summary judgment against Teton View. However, the court did not determine the priority of the respective claims of the parties.

On January 5, 2010, DePatco filed this motion for partial summary judgment. DePatco seeks recharacterization or equitable subordination of Idaho Development's Deed of Trust claim against Teton View. DePatco argues that Idaho Development is not a creditor but rather a partner to Teton View and that the loan to Teton View is better characterized as a capital investment.

The motion was called up for hearing on February 8, 2010. Following argument from counsel for DePatco, Schiess and Associates, ZBS, and Idaho Development, the court took the matter under advisement.

After considering the court's file, pleadings, depositions, admissions, affidavits, and the argument of counsel, the court renders the following opinion.

II.
SUMMARY JUDGMENT STANDARD

Rule 56(c), Idaho Rules of Civil Procedure, provides that "summary judgment shall be granted forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *DBSI/TRI V v. Bender*, 130 Idaho 796, 801, 948 P.2d 151, 156 (1997) (citing *Mutual of Enumclaw Ins. Co. v. Roberts*, 128 Idaho 232, 234, 912 P.2d 119, 121 (1996)).

When assessing the motion for summary judgment, all controverted facts are to be liberally construed in favor of the nonmoving party. Furthermore, the trial court must draw all reasonable inferences in favor of the party resisting the motion. *Litz v. Robinson*, 131 Idaho 282, 283, 955 P.2d 113, 114 (Ct.App.1998) citing *G & M Farms v. Funk Irrigation Co.*, 119 Idaho

514, 517, 808 P.2d 851, 854 (1991) and *Sanders v. Kuna Joint School Dist.,* 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994). If reasonable people could reach different conclusions based on the evidence, the motion must be denied. *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994); *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 720, 791 P.2d 1285, 1299 (1990).

The nonmoving party "may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided..., must set forth specific facts showing that there is a genuine issue for trial." I.R.C.P. 56(e). In attempting to establish such facts, "a mere scintilla of evidence or only slight doubt as to the facts" is insufficient to create a genuine issue of material fact. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*,134 Idaho 84, 87, 996 P.2d 303, 306 (2000). In other words, "the party opposing the motion must present more than a conclusory assertion that an issue of fact exists." *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 401, 987 P.2d 300, 313 (1999).

III.
ANALYSIS

DePatco seeks an order recharacterizing or subordinating Idaho Development's Deed of Trust claim against Teton View. DePatco argues that Idaho Development's claims are those of an investor, not of a creditor. DePatco contends that the money advanced by Idaho Development is a capital investment and, in the alternative, that the loan should be subordinated to other liens as a result of Ms. Boswell's behavior.

After analyzing the facts and case law presented by the parties, this court concludes that equitable subordination is not an available remedy in Idaho state law claims. However, based on the documents before the court, Idaho Development's $1,100,000 advance should be recharacterized as a capital contribution.

Equitable Subordination

DePatco urges this court to equitably subordinate Idaho Development's claims against Teton View to DePatco's lien.

Equitable subordination is a means of "passing on claims presented by an officer, director, or stockholder in the bankruptcy proceedings of his corporation." *Pepper v. Litton,* 308 U.S. 295, 306 (1939).

The Supreme Court maintains that three conditions must be satisfied before equitable subordination is appropriate. The claimant must have engaged in some type of inequitable conduct. *Comstock v. Group of Institutional Investors*, 335 U.S. 211, 229 (1948) "the unconscionable use of the opportunity". The inequitable behavior must produce injury to other creditors. *Id.* Finally, equitable remedies are only appropriate when consistent with the Bankruptcy Act. *SEC v. United States Realty & Improvement Co.,* 310 U.S. 434, 455 (1940).

As DePatco acknowledges, Idaho courts have not considered the application of the theory of equitable subordination to state law claims. Without argument as to the applicability of the doctrine to Idaho state law, DePatco and the other creditors joining in this motion urge the court to equitably subordinate Idaho Development's claim.

Few courts have applied the doctrine of equitable subordination outside of the context of bankruptcy proceedings. Alaska appears to be the only state to explicitly endorse the application, in *White v. State ex rel. Block,* 597 P.2d 172, 176 n. 13 (Alaska 1979) and *Nerox Power Systems, Inc. v. M-B Contracting Co., Inc.* 54 P.3d 791 (Alaska 2002). A federal court in Virginia followed *Nerox*, reasoning that equitable subordination is directly related to the Virginia concept of constructive trust. *Hancock Fabrics, Inc. v. Ruthven Associates, L.P.,* 2007 WL 593573, 8 (E.D. Va. 2007). Additionally, though noting that the doctrine was not applicable to non-bankruptcy cases, the 6th Circuit used the theory for guidance in determining the priority of

claimants under federal common law. *Gaff v. FDIC,* 919 F.2d 384, 393-94 (6th Cir. 1990).

However, the majority of courts to consider the issue have—at the least—declined to apply equitable subordination in non-bankruptcy proceedings. The 2nd Circuit held that equitable subordination is only applicable in bankruptcy cases. *HBE Leasing Corp. v. Frank,* 48 F.3d 623 (2d Cir. 1995). The 11th Circuit declined to apply the doctrine. *FDIC v. Jenkins,* 888 F.2d 1537, 1544-46 (11th Cir. 1989). The 4th Circuit adopted the 11th Circuit's holding from *Jenkins* the following year. *Howard v. Haddad,* 916 F.2d 167, 170-71 (4th Cir. 1990). West Virginia has declined to adopt the doctrine and said that it is "applied almost exclusively in bankruptcy proceedings". *City of Parkersburg v. Carpenter,* 507 S.E.2d 120, 123 (W.Va. 1998). The Illinois Court of Appeals found that equitable subordination is an issue "which can only be decided in a bankruptcy setting." *Paul H. Schwendener, Inc. v. Jupiter Elec. Co.*, 829 N.E.2d 818, 826 (Ill. App. Ct. 2005).

Some commenters argue that the majority position ignores the fact that the bankruptcy doctrine of equitable subordination is a codification of principles derived from equity jurisprudence and state common law. Adam Feibelman, *Equitable Subordination, Fruadulent Transfer, and Sovereign Debt*, 70-FALL Law & Contemp. Probs. 171, 180 (2007); David Gray Carlson, *The Logical Structure of Fraudulent Transfers and Equitable Subordination*, 45 Wm. & Mary L. Rev. 157, 163 (2003).

Carlson, in particular, argues that equitable subordination merely represented an adoption of the state common law of fraudulent conveyances by the Supreme Court in *Pepper* and later by Congress in the Bankruptcy Code. *Id.* The victorious creditor in *Hancock Fabrics* relied on and cited to Carlson, and the district court adopted this reasoning. *See* Hancock Fabrics, Inc.'s Brief in Opposition to Defendants' Motions to Dismiss, Motions to Abstain and Motions to Transfer Venue (NO. 07-10353, BLS) and *Hancock Fabrics,* 2007 WL 593573, 8.

Carlson also argues that the bankruptcy code does not preclude state courts from applying the doctrine, and that decisions invoking equitable subordination would in fact be respected by bankruptcy courts under *res judicata*. 45 Wm. & Mary L. Rev at 213-14.

However, neither the origin of the federal rule nor its effect on subsequent bankruptcy proceedings addresses the primary problem with applying equitable subordination to this case. As useful as equitable subordination may be in cases such as this where there is an allegation of inequitable conduct by a corporate insider but no allegation of fraudulent conveyance, equitable subordination is not the law of this state. This court is in no position to create new law.

As such, this court joins the majority of courts in rejecting the application of equitable subordination to state law.

Debt Recharacterization

DePatco also seeks to have Idaho Development's loan to Teton View recharacterized as a capital contribution.

Though parties and courts often conflate the doctrines, debt recharacterization differs from equitable subordination in that "[r]echaracterization cases turn on whether a debt actually exists—not on whether" there was inequitable conduct. *In Re Adelphia Communications, Corp.*, 365 B.R. 24, 31-32 (Bankr. S.D.N.Y. 2007). The effect of recharacterization is to treat a would-be creditor as an investor whose claims are only satisfied after those of all legitimate creditors. *In re Hedged-Investments Associates, Inc.*, 380 F.3d 1292, 1297 (10th Cir. 2004). .

Debt recharacterization has long been the law in Idaho, though Idaho appellate courts appear to have never referred to the concept by that name.

In *Weyerhaeuser Co. v. Clark's Medical Supply Co.*, 90 Idaho 455 (1966), the dominant shareholder and director of a lumber supply business secured a loan to the corporation with his own real property, valued at $45,000. Eventually the corporation defaulted on the loan and was

dissolved and placed into receivership. The now-former owner and director then filed a claim with the receiver to recover $45,000, arguing that the advancement of his property as collateral constituted a loan to the corporation. *Id.* at 458.

The Idaho Supreme Court noted in its opinion that "the question of whether or not the sole or dominant stockholder of a corporation (who, in this case, was also its president, general manager and a director) may also become a creditor of the corporation by 'loaning' money to it has not previously been decided in Idaho." *Id.* at 460.

The court briefly examined the conflicting approaches to the question employed in other jurisdictions before holding that the advancement of property did "not meet the requirements of a valid loan by a dominant shareholder to his corporation" and that the advancement was a capital contribution. *Id.* at 461. In making the decision the court did not adopt either of the rules followed in other jurisdictions, reasoning that the claim would have failed under either. *Id.*

Similarly, the court has held that a cash advance from a partner to a corporation that is not accompanied by any loan documentation and that is not taxed as a loan was a capital contribution. *Lettunich v. Lettunich,* 141 Idaho 425, 433 (2005).

Idaho Development argues that the facts in this case differ significantly from those in *Weyerhaeuser* and *Lettunich.* In this case, the parties referred to the advance as a loan; a deed of trust and promissory note were prepared to secure the money advanced to Teton View; and the agreement required Teton View to repay the money, with interest, by a set date. Also, Idaho Development did not have the same control over Teton View as the purported creditors did over the corporations involved in *Weyerhaeuser* and *Lettunich.*

DePatco argues that the advance is properly classified as a capital contribution and that the documents creating the corporation and formalizing the advance the do not support the argument that the advance was a valid loan.

As the *Weyerhaeuser* court noted, there are several divergent approaches to analyzing advances from corporate insiders to corporations.

The 11th Circuit is alone in applying a harsh, alternative two-pronged test: "Shareholder loans may be deemed capital contributions in one of two circumstances: where the trustee proves initial under-capitalization or where the trustee proves that the loans were made when no other disinterested lender would have extended credit." *In re N & D Properties,* 799 F.2d 726, 733 (11th Cir. 1986).

Other circuits tend to employ some variation of the 6th Circuit's multi-factor test presented in *Roth Steel Tube Co. v. Comm'r of Internal Revenue,* 800 F.2d 625 (6th Cir. 1986)[3].

Idaho Development relies on the thirteen-factor test applied by the 10th Circuit. In *In re Hedged-Investments Associates, Inc.,* that court established thirteen non-exclusive factors to consider in determining whether to recharacterize debt as equity investment:

> (1) the names given to the certificates evidencing the indebtedness;
> (2) the presence or absence of a fixed maturity date;
> (3) the source of payments;
> (4) the right to enforce payment of principal and interest;
> (5) participation in management flowing as a result;
> (6) the status of the contribution in relation to regular corporate creditors;
> (7) the intent of the parties;
> (8) "thin" or adequate capitalization;
> (9) identity of interest between the creditor and stockholder;
> (10) source of interest payments;
> (11) the ability of the corporation to obtain loans from outside lending institutions;
> (12) the extent to which the advance was used to acquire capital assets; and
> (13) the failure of the debtor to repay on the due date or to seek a postponement.

In re Hedged-Investments Associates, Inc., 380 F.3d at 1298.

In establishing this test, the 10th Circuit expressly rejected an 11th Circuit-style test,

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3 In *In re SubMicron Systems Corp.,* 432 F.3d 448 (3rd. Cir. 2006), the 3rd Circuit identified similar eleven, thirteen, and seven-factor tests used by the various circuits.

reasoning "that such a fixed rule would discourage owners' efforts to salvage a troubled business." *Id.* (see *In re Mid-Town Produce Terminal, Inc,* 599 F.2d 389, 393-94 (10th Cir.1979)).

The 3rd Circuit derides the multi-factor test as a "mechanistic scorecard". *In re SubMicron Systems Corp.,* 432 F.3d 448, 456 (3rd Cir. 2006). Instead, that court held that the decision should be made through a "commonsense conclusion that the party infusing funds does so as a banker (the party expects to be repaid with interest no matter the borrower's fortunes; therefore, the funds are debt) or as an investor (the funds infused are repaid based on the borrower's fortunes; hence, they are equity)." *Id.* The 3rd Circuit also held that while the form of the transaction is a factor to consider, "in the end it is no more than an indicator of what the parties actually intended and acted on." *Id.*

In contrast to the circuit decisions, Massachusetts courts uphold loans that respect corporate formalities and lack "some fraudulent or injurious consequence of the intercorporate relationship". *My Bread Baking Co. v. Cumberland Farms, Inc.,* 353 Mass. 614, 619 (1968)(see *Yankee Microwave, Inc. v. Petricca Communications Systems, Inc.,* 760 N.E.2d 739, 758 (Mass. App.Ct. 2002). "Massachusetts has been somewhat more 'strict' than other jurisdictions in respecting the separate entities of different corporations.").

A leading state test for debt recharacterization is Wisconsin's, established in *In re Mader's Store for Men,* 254 N.W.2d 171 (Wisconsin 1977). The Wisconsin Supreme Court identified three elements almost always present when shareholder loans are recharacterized:

> First, claims are based upon what are denominated loans made to the corporation by one or more stockholders in a position of control within the corporation. The individual claimant's control need not be absolute, but the facts must permit of an inference that the claimant or a group of stockholders of which he is a member were in a position to control the affairs of the company, at least to the extent of determining the form of the transaction in question.

> Second, the circumstances, objectively analyzed, must be such as to indicate that the advance was not intended to be repaid in the ordinary course of the corporation's business, but rather was expected to remain outstanding as a permanent part of the corporation's financial structure.
>
> Third, and closely related to the second element, the paid-in stated capital of the corporation must have been unreasonably small in view of the nature and size of the business in which the corporation was engaged.

Id. at 185-86 (see *Id.* at 186 n.18).

The Idaho courts have never explicitly adopted any of the tests employed in other jurisdictions. In *Weyerhaeuser,* after noting that there was no objective evidence supporting the argument that the advance was a loan, the court simply held that neither the owners "nor the corporation regarded the advancing of the security as a loan." *Weyerhaeuser*, 90 Idaho at 461.

In *Lettunich,* the court looked to both the objective and subjective intent of the parties without relying on a formal test. *Lettunich,* 141 Idaho at 432-33. Although there was conflicting testimony as to the subjective intent of the parties, the court noted that there was no documentation to provide objective evidence that the advance was a loan. *Id.*

In *Vreeken v. Lockwood Engineering, B.V.,* 148 Idaho 89, 218 P.3d 1150 (2009), the Idaho Supreme Court upheld this court's determination that equipment provided by the owner of a corporation to the corporation was a capital contribution. *Id.* at 1171. In that case, this court relied on evidence of the objective intent of the owner. *Id.* Though the owner and others testified that he intended the advancement of the equipment as a loan, this court looked to documentation of the equipment, which provided no evidence that the advance was intended as a loan. *Id.*

From reviewing the few applicable cases, it appears that the Idaho Supreme Court shares the 3rd Circuit's view that a commonsense approach is preferable to a multi-factor test, but that the court also heavily considers the objective form of the transaction.

Here, unlike in the previously mentioned Idaho cases, there is documentation supporting

the argument that the parties intended the advance to be a loan. The documentation called for regular payments and interest and referred to the advance as a loan. Also, Idaho Development acted aggressively to collect on the advance when Teton View failed to meet its obligations under the note.

However, the documentation also contains elements of an equity investment. The joint venture agreement provides that Idaho Development will share in 1/3 of Teton View's profits and bear 1/3 of its losses. The deed of trust and the note were both entered only after the formation of Teton View. Idaho Development was to receive 15% of the net proceeds from each lot sale. The monthly payments required under the note have no relationship to the amount advanced. Additionally, it appears that Teton View had no capital outside of the money from Idaho Development.

The subjective and objective intent of the parties demonstrate that Idaho View sought to be both an investor in and a creditor to Teton View. A problem arises because there is no clear differentiation between the money agreed to be paid back and the money meant to serve as capital for the new entity; they are one and the same.

Outside of the $5,595.06 monthly payment required by the note, all of Idaho Development's expectations of payment were predicated on specific events occurring. $800,000 was to be paid back once another construction loan was secured. A payment representing 15% of the net of each lot sale depended obviously on the success of the enterprise, as did the ability to reap 33.3% of the corporation's profits.

Perhaps most important is what Idaho Development contributed to the corporation. The joint venture agreement provided that Rothchild Properties' total contribution as a 2/3 owner of the corporation "shall consist of devoting all technology, know how, time and skill to the venture, making full use of its expertise gained through participation in similar experiences in the

past." The agreement called for Idaho Development "to initially contribute One Million One Hundred Thousand Dollars ($1,100,000.00) to the joint venture". That sum represented both 100% of Teton View's capital and all of Idaho Development's contribution to Teton View. Idaho Development does not claim that it offered any other support or services to the business.

With that in mind, there is no question that Idaho Development's advancement constituted a capital contribution. Without the advance, Idaho Development clearly would not have possessed any interest in the corporation; with the advance, Idaho Development became a 1/3 owner of the corporation.

It is true that Idaho Development acted aggressively to enforce the terms of the note and deed of trust once it became apparent Teton View was going to fail. However, Idaho Development's understandable desire to recoup its losses after the fact does not affect the nature of the advance at the time it was made.

Idaho Development's claim would most likely be recharacterized as an equity contribution under any of the tests addressed in this section, including Massachusetts' narrow policy. Had Idaho Development clearly differentiated between what money served as its capital contribution justifying its role as a corporate partner and the money intended solely as a traditional loan, then the loan would likely stand and the deed of trust could grant Idaho Development superior position as a creditor. That is not the case here.

Based on the affidavits and exhibits before the court, there is no question of material fact as to the issue of debt recharacterization. Idaho Development's entire advance to Teton View is recharacterized as a capital contribution and subordinated to the claims of Teton View's legitimate creditors.

IV.
CONCLUSION AND ORDER

DePatco's Motion for Partial Summary Judgment is GRANTED. Idaho Development's entire advance to Teton View is recharacterized as a capital contribution and subordinated to the claims of Teton View's legitimate creditors.

IT IS SO ORDERED.

Dated this 2nd day of April, 2010.

Jon J. Shindurling
District Judge

NOTICE OF ENTRY

I hereby certify that on this 2 day of April, 2010, the foregoing ORDER ON DEPATCO'S MOTION FOR PARTIAL SUMMARY JUDGMENT was entered and a true and correct copy was served upon the parties listed below by mailing, with the correct postage thereon, or by causing the same to be delivered to their courthouse boxes.

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